SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1291

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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APPENDIX A.

Statutes Involved.

The following portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151, *et seq.*), are involved in this case:

Section 7:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . ."

Section 8(a):

"It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in section 7;

• • •

(5) to refuse to bargain collectively with the representatives of his employees. . . ."

Section 8(c):

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Section 8(d):

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession. . . ."

APPENDIX A1.

Opinion of the United States Court of Appeals for the Eighth Circuit dated December 22, 1970.

Before Gibson and Lay, Circuit Judges, and Heaven, District Judge.

Lay, Circuit Judge.

Kellwood Company, Ottenheimer Division, petitions to set aside a decision and order of the National Labor Relations Board issued against it for violations of the National Labor Relations Act. 29 U. S. C. A. § 158(a)(1), (3), (5). The Board has cross-petitioned for enforcement of its decision and order reported at 178 N. L. R. B. No. 8. The alleged unfair practices arise from the company's relationship with the International Ladies' Garment Workers' Union, AFL-CIO, relating to the company's operation of its three plants producing garments in Little Rock, Arkansas. In consolidated case No. 19,282, the union petitions for expansion of the remedial order relating to backpay. The primary appeal, No. 19,238, involved four separate charges filed by the union. The examiner has filed a 180 page report; the Board adopted the findings, conclusions and recommendations of the examiner with minor modification.

Upon a thorough canvassing of the record as a whole, we find substantial evidence and with one modification direct the Board's order to be enforced.

A brief history of events will suffice here. Kellwood operates approximately 26 separate plants throughout the United States, selling the major portion of its products

to Sears, Roebuck & Company. The Ottenheimer Division consists of three plants in Little Rock, Arkansas, employing approximately 1,250 persons; its plant in Lonoke, Arkansas, is not involved in this litigation. The union has made several abortive attempts to organize Kellwood plants, but has never succeeded prior to the representation election on January 12, 1966, at the Little Rock plant.[1] On that date, after a strong anti-union campaign, the union was elected, 636-564, to become the collective bargaining representative. Thereafter, the union and company representatives negotiated without success from March 23, 1966, to October 24, 1966. During this period the parties held 30 meetings, some considered formal, others informal bargaining sessions. On October 25, the employees began a strike which continued until November 22, 1967. On December 5, 1967, the company, having replaced the majority of strikers with nonunion employees, declared that it no longer recognized the union.

The unfair practice charges may be generally summarized: (1) the failure to bargain in good faith from March 23, 1966; (2) the unilateral wage increases on October 25, 1966, and February 1, 1967; (3) the refusal to give the union relevant information for bargaining in December 1966; (4) the refusal to reinstate all strikers; (5) bargaining directly with strikers both during and after the strike; (6) pre-election conduct in violation of § 8(a)(1) including the showing to employees of the film "And Women Must Weep." Little purpose would be served in setting forth the factual detail of the events in question. These are fully and fairly set forth in the examiner's opinion as

1. For prior episodes of the union's long struggle for recognition see *Kellwood Co., Ottenheimer Bros. Mfg. Div. of NLRB*, 411 F. 2d 493 (8 Cir. 1969); *NLRB* v. *Hawthorn Co.*, 404 F. 2d 1205 (8 Cir. 1969); *Southern Foundation* v. *NLRB*, 406 F. 2d 1063 (6 Cir. 1969) (no violation found); see also, *Kellwood Co.* v. *NLRB*, 427 F. 2d 1170 (9 Cir. 1970).

adopted by the Board in 178 N. L. R. B. No. 8. Upon review of the entire record it is our decision to enforce the Board's order with only one modification.

We do not find in the company's pre-election use of the film "And Women Must Weep" any transgression of § 8(a)(1). The Board urges that our holding on this issue in *NLRB* v. *Hawthorn Co.*, 404 F. 2d 1205 (8 Cir. 1969), that prediction of dire consequences beyond the control of the company is not a § 8(a)(1) violation, is now rejected by *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969). The Board relies upon *NLRB* v. *C. J. Pearson Co.*, 420 F. 2d 695 (1st Cir. 1969).[2] Assuming *arguendo* this to be true and applying the "objective evidence" test of *Gissel* to our analysis in *Hawthorn*, we find there is no prediction of violence or company reprisal in the introduction to, or the use of, the film. The statement made by the company president concerns the company not wanting "union bosses telling you what to do or what not to do." Our analysis of the film as observed in *Hawthorn* remains the same. It is nothing more than "emotional, anti-union propaganda" and it is difficult to believe that anyone could not "intelligently assess [its] worth." *NLRB* v. *Hawthorn Co.*, 404 F. 2d 1205, 1215 (8 Cir. 1969). Under the circumstances, we find no violation under § 8(a)(1) in its use in the present campaign.

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2. The First Circuit there observed:

"We read the opinion in NLRB v. Gissel Packing Co., 1969, 395 U. S. 575, 89 S. Ct. 1918, 23 L. Ed. 2d 547, as indicating two ways in which an employer's predictions as to possible unhappy consequences of unionization might transgress. The prediction might indicate that unnecessary consequences would be deliberately inflicted by the employer, in other words, a threat of retaliation. Alternatively, consequences not within the control of the employer might be described as probable or likely, when in fact there was no objective evidence of any such likelihood. This would be a retaliatory threat, but it would be an improper threat nonetheless. *Id.* 395 U. S. 575 at 618, 89 S. Ct. 1918." 420 F. 2d at 695.

The basic issue surrounds the § 8(a)(5) violation as it relates to the company's good faith in bargaining. The company insists that it was at all times engaged in good faith bargaining as evidenced by its September 29, 1966, "acceptance" of the union's wage proposal. As thereafter immediately determined, there was no meeting of the minds as to the intended terms of agreement. The examiner, found the "acceptance" "was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process." The examiner's conclusion is challenged. Assuming, solely for the sake of argument, there existed a good faith misunderstanding in the "acceptance" of the company, there are too many other factors which weigh against the company's contention of good faith bargaining.

There exists no dispute that the company's top offer, predetermined by it in May 1966, was not made until October 6, 1966, 18 days before the strike, and that in fact a bargaining agreement was never reached in the period from May 1966 to November 1967. On December 5, 1967, the company officially declared that it no longer recognized the union as the bargaining representative of the employees. The company urges that its refusal to reach an agreement does not justify a finding of bad faith since it had every right to remain firm and not concede to the union's demands. As an isolated proposition we agree since § 8(d) expressly so provides. However, an employer who remains adamant in his offer must subject his firm bargaining position to an appraisal of his good faith intent as manifested by his overall conduct evidencing sincerity to work for an agreement and industrial peace.[3]

3. As Mr. Justice Frankfurter observed in *NLRB* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155 (1956) (separate opinion):

> "A determination of good faith or of want of good faith normally can rest only on an inference based upon more or less persuasive manifestations of another's state of mind. The pre-

NLRB v. *Arkansas Rice Growers Cooperative Ass'n.*, 409 F. 2d 565, 571-72 (8 Cir. 1968); *NLRB* v. *Patent Trader, Inc.*, 415 F. 2d 190, 197-98 (2 Cir. 1969); *Flambeau Plastics Corp.* v. *NLRB*, 401 F. 2d 128, 135 (7 Cir. 1968); cert. denied 393 U. S. 1019 (1969); *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 134-35 (1 Cir. 1953), cert. denied 346 U. S. 887. See also *Sign & Pictorial Union Local 1175* v. *NLRB*, 419 F. 2d 726, 738 (D. C. Cir. 1969); *Caroline Farms Div. of Textron, Inc.* v. *NLRB*, 401 F. 2d 205, 211 (4 Cir. 1968). The Board found that the company throughout the negotiations used various means to embarrass and undermine the union in the eyes of its employees. The examiner concluded and the Board agreed that the company's purpose was to make clear to its employees that the union was ineffective in its role as a representative, that the union could not bring about an agreement and that the company would protect and treat the employees better without the union. Evidence which the Board considered included the announcement of an immediate ten cent raise in Ottenheimer's Lonoke, Arkansas, plant made during the course of negotiations. Prior to this time the most the company had ever offered the union was a five cent raise. *Cf. NLRB* v. *Katz*, 369 U. S. 736 (1962). The announcement at Lonoke was simultaneous to the first communication of the same offer to the union. As the company publicly proclaimed, the increase was decided upon, in part, to convince the employees that they did not need a union. In its announcement the company said:

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vious relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations constitute the raw facts for reaching such a determination. The appropriate inferences to be drawn from what is often confused and tangled testimony about all this makes a finding of absence of good faith one for the judgment of the Labor Board, unless the record as a whole leaves such judgment without reasonable foundation. See *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474."

"You did not have to pay one cent in union dues to get this increase. It was not necessary for you to call on any union outsiders to speak in your behalf in order to get this raise.

"Our Company has always followed the policy of improving wages and working conditions whenever it was able to do so and it will continue to follow that policy in the future. No union can force us to do more than that. This increase should be proof that a union is not needed by a company like ours that treats its employees fairly and rewards them for their good work."

Among other evidence the Board considered was the company's letter of October 24, 1966, to the Little Rock employees which the Board found helped precipitate the strike vote. In this letter the Board found that the company *misrepresented* that, "At 11:00 a.m. this morning, the union said it had no offer on the table." The letter also read: "I hope you will not continue to be misled by a union, which as I see it, is using you to further *its interests* throughout all of Kellwood rather than to protect *your interests* here at Little Rock." Cf. *NLRB* v. *Fitzgerald Mills Corp.*, 313 F. 2d 260 (2 Cir. 1963), cert. denied 375 U. S. 834. The company then stated that it was putting into effect a ten-cent-an-hour increase immediately. This raised the minimum wage paid by Kellwood to $1.35. The company and the union were both aware that on September 22, 1966, the Fair Labor Standards Act was signed by the President raising the minimum wages to $1.40 on February 1, 1967, and $1.60 on February 1, 1968.

The record is replete with substantial evidence of other acts to denigrate the union in the eyes of its members. The evidence is undisputed that the company in its pre-election campaign and in its later bulletins and speeches emphasized that they could not be forced to agree with the union and that they later boasted they were successful

in keeping their promises.[4] We have little difficulty with this record in holding that there exists sufficient evidence to sustain the Board's finding of § 8(a)(5) bad faith. The law is well settled that an employer's communications may be used to evaluate his subjective mood at the bargaining table. See *NLRB* v. *General Electric Co.*, 418 F. 2d 736 (2 Cir. 1969). The negotiations themselves lend support to the inferences taken by the examiner. The company's early shadow bargaining, evidenced by offers which gave no more than the anticipated federal minimum wage increases, cannot be ignored; the unilateral wage increases immediately before and during the strike, their earlier misrepresentation that they would have to confer with Kellwood's Executive Committee before negotiating further, the company's ploy in rehashing old misunderstandings in post-strike meetings, the company's denial of relevant information as requested by the union in bargaining,[5] all are among the many, many incidents considered by the Board supporting an 8(a)(5) violation.

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4. In December 1965, the president of the company said:

"[A]sk the union what happens to employees when they vote for the union in an election and then the company and the union *never* reach an agreement and *never sign* a contract." (Emphasis ours.)

5. On November 30, 1966, the company notified the union that future negotiations would have to afford seniority protection for employees hired to replace strikers. On December 13, the union requested a list of present employees, their job classifications, and rates of pay. The company responded that it felt such information was irrelevant. Approximately two months later when the General Counsel issued a complaint based upon the company's refusal, the company supplied data concerning wages and job classification. However, the information given lacked the employees' names and addresses. The Board held that the names of the employees were requested in good faith and that the information was relevant to continuing negotiations. The examiner found that the company's claim at the hearing that it feared reprisals against the replacement workers was belatedly made and was not asserted at the time of refusal. Under the circumstances presented we find substantial evidence to support the Board's finding. The names of the employees as related to their jobs and wages were essential to good

As Judge Kaufman observed in the *General Electric* case:

> "The difficulty here, however, arises out of the herculean task of legislating a state of mind. Congress has ordered the Board—and this court—to effectuate its policy of encouraging good faith bargaining, and not to avoid it because the mandate is difficult to apply. The Board has done just that. And, on the basis of substantial evidence we agree. A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits 'going through the motions' with a 'predetermined resolve not to budge from an initial position.'" 418 F. 2d at 762.

The question of good faith bargaining is for the Board's expertise more than ours. We satisfy ourselves that there exists substantial evidence, if credibly believed by the examiner and the Board, to support their conclusion. *NLRB* v. *Arkansas Rice Growers Cooperative Ass'n*, 400 F. 2d 565, 572 (8 Cir. 1968). We find it here. We have no difficulty on this record in resolving that there have been violations of § 8(a)(1), (3) and (5), more fully described by the Board, and that the Board's order should be enforced as herein modified.

We further agree that the evidence clearly demonstrates that the strike was precipitated by the company's unfair bargaining tactics in its direct publicity to the employees as an effort to undermine the effectiveness of the union.

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faith negotiations. Cf. *Boston Herald-Traveler Corp.* v. *NLRB*, 223 F. 2d 58 (1 Cir. 1965); *NLRB* v. *Whitin Machine Works*, 217 F. 2d 593 (4 Cir. 1954), cert. denied 349 U. S. 905 (1955). The test for determining the general obligation of an employer to produce information is one of relevancy as it relates to the union's proper performance in its role as bargaining representative of the employees. *NLRB* v. *Acme Indus. Co.*, 385 U. S. 432 (1967); *NLRB* v. *Arkansas Rice Growers Cooperative Ass'n*, supra. Here the company injected into the negotiations the issue of seniority and wages concerning the new employees. The company was in a weak posture to deny access of this information to the union.

Cf. *NLRB* v. *General Electric Co.*, supra. The breaking point came when the company accused the union of "forcing the impasse"[6] and put into immediate effect the ten cent raise on October 25. It is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board. There existed obvious strategy to force a "collision course" and obstruct bargaining. The company succeeded in what it set out to do.

The Board ordered the customary remedy for unfair-labor-practice strikers by requiring full and immediate reinstatement of all employees to their former or equivalent positions commencing five days after the union's unconditional request for reinstatement on November 22, 1967. The union attacks this relief as an abuse of discretion, requesting instead backpay from the date of the strike. We think the remedy is appropriately within the broad discretion of the Board. *NLRB* v. *J. H. Rutter-Rex Mfg. Co.*, 396 U. S. 258 (1969); *NLRB* v. *Gissel Packing Co.*, 395 U. S. 575 (1969).

The Board's order is to be enforced as modified.

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6. Apposite here is the language in *Industrial Union of Marine & Shipbuilding Wkrs.* v. *NLRB*, 320 F. 2d 615, 621 (3 Cir. 1963):

> "[I]t is manifest that there can be no legally-cognizable impasse, *i.e.*, a deadlock in negotiations which justifies unilateral action, *if a cause of* the deadlock is the failure of one of the parties to bargain in good faith."

Furthermore, the company is somewhat hard put to factually assert that an "impasse" existed at the time of the October 25, 1966, unilateral wage increase. Immediately before the strike on October 24, 1966, the evidence was that Mr. Kullman, representing the company, asked the union for a counterproposal to its last offer. Although the union at that time was effectively undermined by the company's open letter to the employees and would have been publicly embarrassed to again make a lower offer, nevertheless, in the position assumed by the company, negotiations were still open for the union to do so.

APPENDIX B-2.

Judgment of the United States Court of Appeals for the Eighth Circuit Dated December 28, 1970.

JUDGMENT.

Before: Gibson and Lay, *Circuit Judges*, and Hunter, *District Judge*.

This Cause came on to be heard upon petitions to review, and on a cross-application to enforce, an order of the National Labor Relations Board dated August 13, 1969, against Kellwood Company, Ottenheimer Division, its officers, agents, successors, and assigns. The Court heard argument of respective counsel on September 14, 1970, and has considered the briefs and transcript of record filed in this cause. On November 25, 1970, the Court, being fully advised in the premises, handed down its opinion granting enforcement of the Board's order as modified. In conformity therewith, it is hereby,

Ordered and adjudged by the Court that Kellwood Company, Ottenheimer Division, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize International Ladies' Garment Workers' Union, AFL-CIO as the exclusive representative of the employees in the appropriate unit.

(b) Refusing and failing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit:

> All production, maintenance and shipping employees at Respondent's Little Rock, Arkansas, operations, ex-

cluding office clerical employees, professional employees, engineering department employees, outlet stores' employees, guards and supervisors as defined in the Act.

(c) Unilaterally granting wage increases to employees in the appropriate unit.

(d) Refusing to give the Union requested information that is relevant and reasonably necessary to the Union's intelligent bargaining concerning a bargaining issue raised by Respondent[1] or any other bargaining issue.

(e) Refusing to reinstate unfair labor practice strikers upon the termination of the strike and their unconditional application for reinstatement.

(f) Bargaining directly with unfair labor practice strikers concerning their return to work during the strike and after the strike.

(g) Frightening employees by talk of a strike when there is no serious consideration of a strike among employees and union organizers.

(h) Threatening employees that it is futile for them to join, support, and vote for a union.

(i) Threatening that unions and strikes go together, that a strike is inevitable if a union wins an election, and that in a strike employees might lose their jobs.

(j) Threatening employees that it will not negotiate and sign a contract with the Union, with dire consequences to the employees.

(k) Interrogating employees and interfering with them concerning the exercise of their Section 7 rights.

(l) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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1. Kellwood Company, Ottenheimer Division.

2. Take the following affirmative action which the Board has found will effectuate the policies of the Act:

(a) Upon request, recognize and bargain collectively and in good faith with the Union as the exclusive representative of all its employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Bargain in good faith with the Union concerning any wage increase or any other change of any term or condition of employment, before putting it into effect.

(c) Upon request give the Union requested information that is relevant and reasonably necessary to the Union's intelligent bargaining concerning any issue raised by Kellwood Co., Ottenheimer Division or any other bargaining issue.

(d) Offer to all strikers, including those named on General Counsel's Exhibit 171 and its two pages of attachments, immediate and full reinstatement to their former or substantially equivalent positions, discharging if necessary employees hired since the commencement of the strike, and make each striker whole for any loss of pay he may have suffered because of the discrimination against him, in the manner set forth above in the section of the Trial Examiner's Decision entitled "The Remedy."

(e) Notify all unfair labor practice strikers, including those named in General Counsel's Exhibit No. 171 and its two pages of attachments, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

(f) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards,

personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Judgment.

(g) Post at its three plants in Little Rock, Arkansas, copies of the attached notice marked "Appendix". Copies of said notice, on forms provided by the Regional Director for Region 26, Memphis, Tennessee, after being duly signed by Kellwood Co., Ottenheimer Division's representative, shall be posted by Kellwood Co., Ottenheimer Division immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to all employees are customarily posted. Reasonable steps shall be taken by Kellwood Co., Ottenheimer Division to insure that said notices are not altered, defaced, or covered by any other material.

(h) Notify the said Regional Director in writing, within 10 days from the date of this Judgment, what steps Kellwood Co., Ottenheimer Division has taken to comply herewith.

APPENDIX B-3.

Order of the United States Court of Appeals for the Eighth Circuit dated December 28, 1970.

The Court having considered petition for rehearing en banc filed by counsel for petitioner Kellwood Company, and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and it is hereby denied.

APPENDIX B-4.

Order of the United States Court of Appeals for Eighth Circuit dated December 31, 1970.

On Consideration of the motion of petitioner, Kellwood Co., etc., for a stay of the issuance of the certified copies of the judgment in these cases pending a petition to the Supreme Court of the United States for a writ of certiorari, it is now here ordered by this Court that the issuance of the certified copy of the judgment herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

APPENDIX C-1.

Decision and Order of the National Labor Relations Board (178 NLRB No. 6).

DECISION AND ORDER.

On January 28, 1969, Trial Examiner Alba B. Martin issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent and the Charging Party filed exceptions to the Trial Examiner's Decision and supporting briefs. The General Counsel filed cross-exceptions and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with these cases to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, the briefs, and the entire record in these cases, and hereby adopts the findings, conclusions,[1] and recommendations of the Trial Examiner[2] as modified herein.

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1. We agree with the Trial Examiner that the Respondent violated Section 8(a)(1) during its pre-election campaign but, considering the other conduct involved and the broad Order herein, we find it unnecessary to pass upon the legality of its conduct in "denigrating" the Union or in sanctioning the circulation of anti-union literature during working time. Nor do we need to consider the Trial Examiner's views on backpay where unfair labor practices are the sole cause of a strike.

2. The Respondent's Motion to Reopen Record is denied as lacking in merit.

ORDER.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the Recommended Order of the Trial Examiner, as modified herein, and hereby orders that the Respondent, Kellwood Company, Ottenheimer Division, Little Rock, Arkansas, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, as so modified:

1. Delete subparagraphs (j) and (m) of paragraph 1 of the Trial Examiner's Recommended Order, and reletter subparagraphs (k), (l), (n), and (o) of paragraph 1 to read (j), (k), (l), and (m) respectively.

2. Add the following as a new subparagraph (e) of paragraph 2, and reletter the existing subparagraphs (e), (f), and (g) accordingly:

(e) Notify all unfair labor practice strikers, including those named in General Counsel's Exhibit No. 171 and its two pages of attachments, if presently serving in the Armed Forces of the United States, of their right to full reinstatement, upon application, in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

3. Delete the eighth and eleventh indented paragraphs in the Appendix attached to the Trial Examiner's Recommended Order.

Dated, Washington, D. C.

JOHN H. FANNING, *Member,*
GERALD A. BROWN, *Member,*
HOWARD JENKINS, JR., *Member.*
National Labor Relations Board.

(SEAL.)

APPENDIX C-2.

Decision of the National Labor Relations Board Trial Examiner.

STATEMENT OF THE CASE.

ALBA B. MARTIN, *Trial Examiner:* With all parties represented by counsel, this consolidated proceeding was heard before Trial Examiner Alba B. Martin, in Little Rock, Arkansas, between February 5 and February 23, 1968, on complaints of the General Counsel of the National Labor Relations Board and answer of Kellwood Company, Ottenheimer Division,[1] herein called Respondent and the Company. At my urgent request prior to the opening of the hearing, the parties were completely cooperative with each other and with me during the hearing. This greatly shortened a potentially long hearing and yielded a compact, evidence-full record.[2]

The General Counsel and the Union contended that Respondent bargained in bad faith with the Union with no intention of entering into a final or binding collective-bargaining agreement with the Union; that Respondent unilaterally put wage increases into effect on October 25, 1966, and February 1, 1967; that Respondent refused to

1. Respondent's name appears as amended at the hearing.

2. The Union filed all the charges, the original charges being filed as follows: In Case 2313, on January 28, 1966; in Case 2641, on December 29, 1966; in Case 2721, on March 27, 1967; in Case 2952, on December 6, 1967. The Union filed the first amended charge in Case 2952 on December 11, 1967. The Regional Director issued his second order consolidating cases, amended consolidated complaint, and notice of hearing, on December 22, 1967.

furnish the Union with certain information requested by the Union; that Respondent bargained directly and individually with employees in the appropriate unit—all in violation of Section 8(a)(5) and (1) of the Act;[3] that Respondent further violated Section 8(a)(5) by refusing to recognize the Union after December 5, 1967; and that Respondent independently violated Section 8(a)(1) by interrogations, threats, denigrating the Union and advising employees of its futility, by enforcement of a no-solicitation rule against the Union while permitting the circulation of antiunion literature and petitions on company time, and by exhibiting the movie "And Woman Must Weep" to employees.

Respondent denied committing any unfair labor practices and contended that it was the Union, not Respondent, who bargained in bad faith.

The General Counsel and the Union contended, and Respondent denied, that the strike from October 25, 1966, to November 22, 1967, was an unfair labor practice strike, that the strikers rather than the replacements are entitled to the jobs, and that Respondent violated Section 8(a)(3) by not reinstating the strikers and Section 8(a)(5) by dealing directly with the strikers concerning their return to work. The General Counsel, the Union, and Respondent filed in late April 1968 excellent briefs which have been duly considered. Copies of letters the opposing attorneys wrote each other shortly after the briefs were in are in the exhibit file as Trial Examiner's Exhibits 1 and 2.

On August 7, 1968, the General Counsel filed a motion to amend the amended consolidated complaint to allege that if the strike is found to be an economic strike the strikers were improperly reinstated under the Board's recent decision in *The Laidlaw Corporation*, 171 NLRB No. 175. As

3. The Act refers to the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*

I find below that the strike was an unfair labor practice strike, the General Counsel's motion is denied. The General Counsel's motion, the Union's letter with reference thereto, and Respondent's memorandum in opposition have been placed in the exhibit file as G. C. 1ggg, 1hhh, and 1iii, respectively.

Upon the entire record and my observation of the witnesses, I hereby make the following:

FINDINGS AND CONCLUSIONS.

I. The Business of the Respondent.

Kellwood Company (herein called Kellwood), a Delaware corporation with its principal office in St. Louis, Missouri, was formed in December 1961 out of approximately 15 independent corporations having approximately 26 plants. It sells the "major portion" of its products to Sears Roebuck & Co.; in 1966 this portion was 80 percent of its output.[4] In the corporate organization each of the independent corporations became a division of Kellwood Company, and each former corporation president became a division president.

Kellwood Company's Ottenheimer Division, principally involved herein, manufactures women's apparel and consists of three plants[5] and a distribution center in Little Rock, Arkansas, employing approximately 1,250 employees; and a plant at Lonoke, Arkansas, about 25 miles from Little Rock, which employs approximately 325 employees. Stanley M. Guthunz is president of the Ottenheimer Division.

4. This finding is based upon testimony of Kellwood Company's employee relations director, William S. Keeline, in Case 26-CA-2560 (170 NLRB No. 184) of which I took official notice.

5. The three plants are in one large building. They are referred to herein as the plant and the plants.

He is also a vice president of Kellwood Company, a member of its board of directors, and a member of the executive committee of its board of directors. He has held all of these positions since the inception of Kellwood Company. Prior to that, he had been president of Ottenheimer Brothers Manufacturing Company, Inc. for a number of years.

Kellwood Company, Ottenheimer Division, referred to herein as Respondent, the Company, the Ottenheimer Division, and Ottenheimer, during the year prior to December 22, 1967, purchased and received at its Little Rock plants, directly from points outside of Arkansas, products and materials valued in excess of $50,000; and during the same period manufactured, sold, and shipped goods and products valued in excess of $50,000 from its Little Rock plants directly to points outside of Arkansas. Respondent admitted, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved.

International Ladies' Garment Workers' Union, AFL-CIO, herein called the Union and I. L. G. W. U., is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices.

A. *The Setting: Kellwood and Ottenheimer Policies Towards Unions and for the Negotiations.*

The Union undertook to organize plants in at least three divisions of Kellwood in 1965 and early 1966. It began organizing the Ottenheimer Division's three plants in Little Rock, the plants principally involved herein, in about August 1965. It started organizing at the Lonoke plant of the Ottenheimer Division in February 1966,[6] and in the

6. See 170 NLRB No. 183.

Hawthorn Division in Missouri in late 1965.[7] It started organizing at the Alamo plant of the Southern Division in April 1966.[8]

Respondent's wages are low. Prior to February 1, 1967, the Federal minimum wage was $1.25. On that date it became $1.40. On February 1, 1968, it became $1.60. At the beginning of the negotiations involved herein, Respondent's minimum wage was the Federal minimum wage of $1.25. The Union's policy was to try to get at least 25 cents above the Federal minimum for inexperienced help, and at least 20 percent above contract minimum for operators, pressers, cutters, and others in the category of experienced help, many of whom were on piecework. At a crucial point in the hearings herein the Union's president, Louis Stulberg offered 10 cents above the Federal minimum for a first raise. Stulberg credibly testified that that was the "lowest point . . . we have ever tried to negotiate with any firm. We were that anxious to get an agreement."

On January 26, 1966, 2 weeks after the Union won the election at Ottenheimer, President Wenzel of Kellwood reported on Kellwood's policy "regarding future negotiations and labor relations." At a meeting of the executive committee of Kellwood's board of directors, according to the minutes of the meeting, Mr. Wenzel reported that "the Company will endeavor to establish minimum benefits standards which are to apply to all Divisions."

Long antedating and concurrent with this policy to endeavor to grant only minimum benefits to employees, Kellwood had another company-wide policy, which included Respondent Ottenheimer Division, to "use every legal means available to us to combat organization" of its employees. These were the words of President Guthunz before me. Guthunz said this had been Kellwood's policy

7. See 166 NLRB No. 20.
8. See 170 NLRB No. 184.

since its inception in 1961, and was the policy of Respondent's Ottenheimer. Kellwood President Wenzel confirmed this policy in Case 170 NLRB No. 183, when he testified that it is Kellwood's policy to do whatever it can to prevent a union from coming into any of its plants, but that the policy does not include violating the law.[9]

Prior to the Union's victory in the Little Rock election described below, Respondent had successfully warded off all unions and kept all plants unorganized, despite the efforts of several unions to organize a number of them over a period of years.

Thus far, Kellwood's antiunion policy has carried it over the brink from lawfulness to unlawfulness in three of its divisions, including the Lonoke plant of the Ottenheimer Division. 166 NLRB No. 20, 170 NLRB No. 183, 170 NLRB No. 184.

Neither the minutes of the executive committee of Kellwood's board of directors nor any direct testimony by Respondent herein undertook to explain why Kellwood and Respondent decided to give employees only minimum benefits standards, including minimum wages. During the negotiations, Respondent assured the Union that it was not claiming inability to grant more economically than it was offering in its proposals. It follows that Respondent's policy to grant only minimum benefits and wages to employees was based upon something other than inability to pay. The question arises on this record as to whether, in offering little more than the minimum in the negotiations, Respondent was just bargaining hard, or whether it was carrying out its policy of trying to keep the Union out of its Ottenheimer plants even though the Union had won an election; and whether, as contended by the General Counsel and the Union, it was trying to provoke a strike so that it

9. This testimony was included in testimony from Case 170 NLRB No. 183, of which I took official notice at the hearing.

could defeat the Union by replacing its union employees with nonunion replacements. After careful consideration I agree with the latter view.

B. *The Union Becomes the Bargaining Agent.*

Pursuant to a petition filed by the Union on October 28, 1965 (26-RC-2533), the Board conducted an election on January 12, 1966, which the Union won 666 to 564. The minutes of a meeting of the Union's general executive board held in March 1966 referred to this as "a surprise victory" against "a ruthlessly antiunion firm." The appropriate unit consists of all production, maintenance and shipping employees at Respondent's Little Rock, Arkansas, operations, excluding office clerical employees, professional employees, engineering department employees, outlet stores employees, guards and supervisors as defined in the Act. On March 3, 1966, the Union was certified as the exclusive representative of the employees in this unit. This became the first unit of Kellwood's Company's plants ever to be organized and represented by a Union.

C. *Respondent's Antiunion Campaign; Its State of Mind Just Before It Entered Negotiations.*

The Union's victory in the election was achieved despite a vigorous, hostile, many-faceted, massive, antiunion campaign by Respondent.[10] This campaign utilized, *inter alia*, speeches and letters by President Guthunz, talks by super-

10. This subject matter was the subject of a settlement in Case 26-CA-2313, which the Regional Director set aside on the ground that it had been breached and that unfair labor practices continued. This testimony is considered as background evidence for whatever light it casts upon Respondent's motive or object during the negotiations and other postsettlement activities. Cf. *Local Lodge No. 1424, I. A. M. (Bryan Mfg. Co.) v. N. L. R. B.*, 362 U. S. 411; *Northern California Dist. Council of Hodcarriers & Common Laborers of America, AFL-CIO (Joseph's Landscaping Service)*, 154 NLRB 1284, 60 LRRM 1156 (1965), enfd. 369 F. 2d 721, 67

visors, leaflets, posters, interrogations, threats, solicitations, messages as to the futility of selecting the Union as bargaining agent, and the showing of the movie, "And Women Must Weep."

1. Guthunz' Speeches.

During the Union's organizational campaign, which started on or about August 19, 1965, and continued until the election on January 12, 1966, President Guthunz spoke to his assembled employees on eight occasions: On August 27, September 2, November 29, December 15, 17, 21 and 23, and January 11. Some were short announcements. Others were talks that lasted as long as 15 minutes or more.

In his first announcement on August 27, Guthunz announced a wage increase of 7½ cents per hour and an additional paid holiday.

In his first speech, on September 2, about 2 weeks after the beginning of the union campaign, Guthunz said, in pertinent part:

> As all of you know, a union is trying to get into the plant. . . . I want you to know that we are taking a strong stand against the union. I am convinced that the union would be harmful to you and to our business. . . . The Union has tried to get in here at least five different times in past years, and the union has failed every time—just like it is going to fail this time. . . . During the past, there have been no strikes—no picket

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LRRM 2502 (C. A. 9, 1968); *Shurtenda Steaks, Inc.*, 161 NLRB 957, 959, *Cloverleaf Cold Storage Co.*, 160 NLRB 1484, 1486. *Stowe Rauh & Door Company* v. *N. L. R. B.*, 401 F. 2d 676, 69 LRRM 2450, 2452 (C. A. 5, 1968). The use of this testimony does not violate Section 10(b) of the Act. *N. L. R. B.* v. *Ritchie Manufacturing Company*, 354 F. 2d 90, 61 LRRM 2013, 2019 (C. A. 8, December 1965). *Local Lodge No. 1424, I. A. M., AFL-CIO* v. *N. L. R. B.*, *supra* at 416, 417, 45 LRRM 3212. This testimony is set forth at this point so that readers will know the prologue before they read the play.

lines—no union trouble at Ottenheimer's because there has been no union in the plant. Our employees have never lost an hour's work or a minute's sleep due to a union strike—all that could change overnight if you let the union in the plant.

• • • • •

. . . even if the union won an election here—the Company still would not have to sign the union's contract and fulfill the promises the union made to you. There is nothing automatic about the signing of a union contract. The Company has the right to say NO to the union's contract proposals.

Union pressure on this Company could lead to a strike and all the trouble that goes along with a strike.

• • • • •

You would be the loser in a strike. You would not get your pay during a strike. . . . And most important of all—you could lose your job in a strike. If the union calls you out on a strike over the things it has been promising, the Company is perfectly free under the law to hire permanent replacements for you. Once this happens, the Company is under no obligation to give you your job back—even after the strike is over. I want to repeat that, because it is so important. If the Union calls you out on an economic strike, the Company is free to hire permanent replacements for you. If you are replaced during a strike, your job is lost.

• • • • •

When I became President of this Company 11 years ago, we had about 600 employees and Tuf-Nut had about 600 employees. During the past 11 years, Tuf-Nut has operated with a union. We have operated without a union. During that 11 year period, the number of jobs at Tuf-Nut has gone down, not up. Now they have only about 450 employees. During the same 11 year period, we have grown and expanded, and we now have over one thousand seven hundred and fifty employees, here and at Lenoke. But please remember this—there will be no continued job security without

> the continued success of our business. That success depends entirely upon whether or not Sears continues to buy our products. We have been in business many years without any serious labor problem. Sears knows that—and they like to do business with a Company that has no labor trouble. . . . If our production were disrupted by a strike, Sears could lose confidence in us. If that ever happens, none of us will enjoy the job security we have enjoyed in the past. [Emphasis omitted.]

On November 29 President Guthunz talked to his employees for some 18 minutes. He said, in pertinent part:

> The union could cause plenty of trouble for everyone at Ottenheimer's if it got in here. I am convinced that the union would be harmful to our employees and harmful to the Company. Let me give you the reasons why I feel this and why we are taking a strong stand against the union.
>
> *First of all unions and strikes go together.* Where you find one, you find the other. If we have a strike at this plant, both our employees and the Company, will be hurt. Everybody loses in a strike except the union. . . . [Emphasis supplied.]
>
> • • • • •
>
> If the union should win an election here we would be required to meet with the union . . . to bargain with the union . . . to negotiate. But please listen to this carefully—even if the union should win an election, we still would not have to agree to their demands and we still would not have to sign the contract the union submitted to us. Even though we bargained with them, we still would have the right to say "NO" to their demands. HOW could the union force us to agree to its demands? HOW could the union force us to sign its contract? The *only* thing they could do is call you out on strike and a strike would hurt you and Ottenheimer's. During a strike . . . you would run the risk of losing your job by being replaced with other workers.
>
> • • • • •

> Let me remind you that Ottenheimer's is a Division of Kellwood Company. Kellwood has 30 plants located all over the United States and there is not a union in any of those plants. Kellwood has 12,000 employees and *no union*. I want to repeat that because it is so *important*. There is no union in any Kellwood plant anywhere. . . . Unions have tried time after time to get in the plans of Kellwood, but the union has always failed. When Kellwood says they don't want the union in any plant, they mean it, and I sincerely hope that none of you will take Kellwood's position on unions lightly.
>
> Please remember that Kellwood can say "NO" to the union's demands even if the union should be voted in. Kellwood is not going to agree to sign any contract which is not to the best interests of our employees and the Company. A union victory in the election and union pressure on this plant could lead to a strike and all the trouble for both you and the Company that would go along with the strike.

Guthunz then restated and expanded his position that Respondent could lose Sears as a customer because of union trouble, and that, if Respondent lost Sears as a customer, it would be "in deep trouble." He then quoted figures as to the alleged number of plants in the garment industry which had closed in the past 3 years and the alleged number of garment employees who had lost their jobs. Guthunz then related a story about another company and its alleged plant closings because of labor trouble. Guthunz then made the point that the employees did not have to pay union dues and fees in order to work at the plant. He said "[t]he union is nothing but a parasite. They know we have a good plant here with a good group of employees. Like a leech, they want to hang on and take part of your earnings with their dues, fees, and assessments. I am against that."

In an announcement to employees on December 15, Guthunz again referred to the large number of unionized

plants being closed down, and that 'that is something you should think about in connection with the union issue." Guthunz again stated that Respondent did not have to agree to any union demand. He ended his announcement as follows:

> One other thing—ask the union what happens to employees when they vote for the union in an election and then the company and the union *never* reach an agreement and *never sign* a contract.

On December 17 and 21, Guthunz made announcements as to the date for the election and urged employees to vote NO. On December 17, he concluded:

> We are sure that the union will be badly beaten in an election and we hope that after this is accomplished they will leave you alone and we can continue building for the future.

He concluded his December 21 announcement as follows:

> You have only 3 more weeks of this union mess and on January 12th you can put an end to all the dissension in the plants by voting *NO*.

On December 23, 1965, Guthunz reviewed briefly the recent progress of the Company and stated that the future would be bright except for the fact that the employees might choose the Union; in which event, "our future could be changed by events over which I would have no control."

In his final talk to employees on January 11, 1966, the day before the election, Guthunz summed up his "feeling on the union issue." He said, "[y]ou know exactly where we stand. You know that we don't want the union in here and you know the reasons why we feel so strongly about the union. I speak to you from my heart when I tell you I am firmly convinced that the union would be bad for you—bad for the company—bad for all of us." He told of a plant in another town in Arkansas which had a contract

with the Union and under which contract the employees had fewer benefits than Respondent's employees had without the Union. He again referred to Tuf-Nut which he said has been going downhill with a union while Respondent has been making progress and improving wages and benefits without a union. He concluded, "by your landslide vote against the union they will know that they are not wanted or needed here at Ottenheimer's. I know you are with me. I know I have your loyal support, and from the bottom of your heart I thank you. GOD BLESS YOU ALL."

2. Wenzel's Speech.

Nine days before the election, on January 3, 1966, the president of Kellwood Company, Fred W. Wenzel, talked to the Ottenheimer employees. He referred to union trouble hanging over the plant. He said,

> I have been a witness to serious union trouble at other companies. I have watched union strikes destroy jobs. I have watched union strikes cause orders to be cancelled. I have watched union strikes cause business to be lost forever. As a result of union strikes, both companies and their employees are hurt. Everybody loses in a strike except the union. The union loses nothing because the union has nothing at stake.

He said that Kellwood does not want the Union at any of its 30 plants. He said, "there's no union in any of the Kellwood plants. Unions have tried time after time to get in the plants of Kellwood, but the union has always failed." He observed that Kellwood had never had a union strike, that the employees have never had to worry about the "dangers and risks and uncertainties of union trouble," and that this could change overnight if the union got in here. He said,

> I cannot say how long a strike at Ottenheimer's might last—for a week, a month, a year, or longer. *But I can*

> *guarantee this*—if the union gets in and there is a strike, Kellwood Company, all of Kellwood's facilities, and all of Kellwood's plants will stand behind Mr. Guthunz and will fully support him and Ottenheimer's during the strike.

Later Wenzel added "there is no need for you to run the risk of union strikes. There is no reason for you to expose yourself to the dangers of union trouble."

3. Talks by Plant Manager Short.

Upon instructions from President Guthunz, the plant manager of Respondent's loungewear plant in Little Rock, who had some 230 employees under him, talked to about 200 of them in his office in groups of 4 to 6 at a time. He gave the same talks, based upon notes, about 30 or 40 times, beginning about November 3, 1966. Short credibly testified that he adhered closely to his notes because he knew that to deviate would be an unfair labor practice. His notes showed that he elaborated on the theme that ran through Respondent's propaganda. He told the employees that the Company did not have to sign the Union's contract or any contract that was not to the best interest of the employees or the Company; that it is one thing for the Union to make promises and another for the Union to make good on them. If the Union was voted in, he asked, and the Company did not agree to sign the Union's contract, how could the Union *make* the Company keep the promises the union organizers had made? He said there would be only one thing the Union could do—strike. He said the union organizers would not be on strike, but only the employees, that the organizers had nothing to lose. He said that employees could not collect unemployment money while on strike, that they could lose their jobs while on strike, that the Union was investing $40,000 in this campaign and that if the Company did not agree to sign the Union's contract

the Union would call a strike to try to make the Company sign up. He said that if the Company should lose its Sears business, he did not know if it would ever get back.

These carefully contrived expressions carried over to employees as they were obviously intended to carry. Thus two employees credibly testified that Short said the Company would not sign a contract and would close the plant first. This is what they understood Short to say and what on the whole record I find Respondent wished them to understand.

4. Activities of Lower Supervisors.

During the campaign, according to uncontradicted credible testimony, minor supervisors interrogated employees concerning their union sympathy; tried to persuade an employee to remove a "vote yes" sign and wear a "vote no" sign; said that if you get the Union in, you might be fired. In addition, several employees testified concerning the passing of antiunion petitions down the work lines during working hours while supervisors were on the line. One supervisor wrote on a petition "I would if I could" sign the antiunion petition. Another, Hendrickson, handed out antiunion leaflets to operators at work on the line. One petition passing down a line said the employees should vote against the Union because it would be impossible for 1,300 employees to find employment elsewhere. One witness testified that 25 to 30 employees signed an antiunion petition while a supervisor was on the line. A witness credibly testified that Supervisor Turner had said President Guthuns had said he would not sign a contract and he meant it. Another witness testified Supervisor Bridges said the company lawyer said that to get the Union in the employees would have to strike.

Prior to the union campaign there was a no-solicitation rule posted on the company premises in one place. When

during the campaign Personnel Manager McClain learned there was an antiunion petition on the bulletin board, he removed it immediately.

5. Letters, Sample Ballots, Posters, Film.

During the pre-election period Respondent was also distributing letters to its employees carrying the same general message that strikes and unions went together as has been seen in the talks of Guthunz and Wenzel. For example, in a letter to employees dated November 27, 1965, Guthunz said:

> There is *no need* for you to run the risk and dangers of strikes and trouble. . . . You should not let the union talk you into gambling with your job by turning it over to the union. *You have too much at stake.*

On December 4, 1965, after correcting a misstatement of the law in a union leaflet a few days before, Guthunz wrote the employees:

> Ask the union HOW they could make the Company agree to their demands and sign their contract.
>
> There is only one true answer to that question—the union would call YOU out on STRIKE to TRY to get the things they promised to get for you. If the law made the Company sign a union contract, why do you think there are thousands of union strikes every year?
>
> If the union pulls you out on strike:
>
> (3) YOU COULD LOSE YOUR JOB! Under the law the Company can *permanently* replace economic strikers with new workers. Once a striker has been replaced, *her job is gone!*

On December 11, 1965, Guthunz wrote the employees a letter about job security. Among other things he asked: "How much security would you have if the union won an election and then called you out on strike? How much

security would you have if the union closed this plant down with a strike?"

On December 24, 1965, Guthunz wrote the employees a letter talking about union fees, dues, assessments, contributions, fines, and penalties and said that the reason the Union is trying so hard to get into Ottenheimer's is because the Union is after your money.

On January 3, 1966, Guthunz wrote the employees: "You already know you could lose your job in a union strike by being replaced with another worker. Can you afford to run the risks and dangers of a union strike?" He then asked employees to consider who was going to pay the rent, the groceries, pay the other bills, and where an employee could find another job, if he loses his job in a strike.

On January 7, 5 days before the election, under a sample ballot marked "NO" Guthunz wrote the employees, "You can say NO to union strikes, picket lines, loss of work, dues, fees, and union trouble by voting NO in the election."

During the campaign, Respondent also mailed to employees a leaflet contrasting what the Company had done and the Union had not done for the employees in the past, and as to the future wrote this:

> Ottenheimer Bros. will guarantee *this*: I, S. M. Guthunz, president of Ottenheimer Bros., Mfg., Co., do hereby guarantee that if you do *not* have a union in our plant, you will *not* lose your job on account of a strike. [This was followed by the purported signature of Guthunz.]

Opposite the above was the following:

> Will the Union guarantee *this*? Mr. Guthunz has signed a guarantee that you will not lose your job on account of a strike if there is no union here. Now ask the organizers if they will sign the statement below:

> I hereby guarantee that if the Union wins the election no employee in the plant will lose her job because of a strike.

Following this is a line for a signature and under that the statement:

> If any union representative, or anyone for the Union, signs this guarantee—ask him HOW the Union is going to make the Company do anything if it doesn't intend to pull a strike.

During the campaign Respondent also issued to employees and posted in the plant multicolor posters, some as large as 4 feet by 3 feet, carrying out the theme that unions and strikes go together, and telling of other companies who said "NO" to the demands of other unions, strikes ensued, the plants closed down, and the employees were out of jobs. One poster purported to list the strikes called by the Union.

During the campaign, Respondent showed the film "And Women Must Weep" to the employees on company time. This was the same film, the showing of which the day before an election the Board has found to be "in the nature of misrepresentation which exceeded the bounds of permissible campaign propaganda and an interference with the election the following day." In *Plochman and Harrison—Cherry Lane Foods, Inc.*, 140 NLRB 130, the Board set the election aside. Here, as there, Respondent introduced the film with the statement, contrary to the Board's finding, that it was a "true" portrayal of what happened to people in an actual strike situation. In its introduction Respondent continued its theme that unions and strikes go together. The Board has held the showing of this film to be a violation of Section 8(a)(1) of the Act. *Southwire Company*, 164 NLRB No. 135; 150 NLRB 594.

6. Conclusion.

The conclusion is inescapable from the above that Respondent, in all of this, was seeking to show the employees the utter futility of their joining, supporting, and voting for the Union; was seeking to convince the employees that Respondent did not want the Union and had no intent to sign a contract with the Union; that the Respondent would not agree to the Union's demands and that a strike was inevitable, and that an inevitable result of such strike would be the loss of their jobs by the employees. Throughout this propaganda runs the theme that the Company does not have to reach agreement with the Union, that it has the right to say "NO" to union demands, that the *only* thing the Union could do would be to call a strike. I conclude that this was the state of mind, and the intention, with which Respondent entered the bargaining negotiations.

Of particular note is that during the pre-election campaign, insofar as the record showed, there was no serious talk among employees or union organizers of striking the plant. In fact, referring to this period of time President Guthunz told employees on November 29, 1967; "the Union told our employees there would be no strike, no trouble, and that there was nothing for them to worry about." Thus Respondent's propaganda was not in answer to any real threat of a strike, but was designed to frighten the employees away from the Union and to defeat the Union at the election. The Board, with court approval, has held such company activity to be in violation of Section 8(a)(1) of the Act. *Hoffman-Taff, Inc.*, 185 NLRB 1319, 1321; *Orkin Exterminating Company of Florida, Inc.*, 152 NLRB 83, enfd. 370 F. 2d 972 (C. A. 5), 65 LRRM 2813.

D. *Respondent's State of Mind After the Negotiations.*

After some 30 bargaining sessions, a 13-month strike, and the replacement of all, or most, of the strikers, President Guthunz again spoke to the Little Rock employees. On November 29, 1967, Guthunz gave the following talk to the Little Rock employees. The following day Plant Manager McKibben read the same talk to the Lonoke employees, stating that Guthunz had given the talk the day before to the Little Rock employees:

> The purpose of this meeting is to bring you up-to-date on the status of the union activity and the union strike here at Ottenheimer's. Most of you were not here when the union activity first began, so I will start at the beginning and trace the events that have occurred.
>
> The union organizers first showed up around here back in 1965. They began to contact our employees, call on them at their homes, and pass out union propaganda at the plant. They made all kinds of big promises. They promised to get the employees big raises, more benefits, and better working conditions. They went on and on about what they could do for the employees. The sky was the limit and there was no end to the union's sales talk.
>
> *Unfortunately*, a number of our employees listened to the union's promises and became involved with the union. A number of them signed union cards. The union told our employees there would be no strike, no trouble, and that there was nothing for them to worry about.
>
> On January 12, 1966, the National Labor Relations Board conducted an election here at the plant and the union won a close election among our employees. After the election the company and the union began to meet and bargain on the terms of a contract. There was

meeting after meeting between the company and the union but no agreement was ever reached on the terms of a contract. The union for reasons of its own apparently didn't want to agree. On October 25th, 1966, it called the employees out on strike. The union continued to make big promises. The union told the strikers not to worry, that the union would win the strike, and that the strike would not last long.

The strike began and the company continued to operate the plant during the strike by hiring new employees to replace the strikers. Many of you came to work during that time.

I don't have to tell you that the strike lasted over a year and that it was finally called off by the union. On November 21, 1967, the union called off the strike and gave up. There was violence and plenty of trouble during the strike, as you know, and no contract has ever been signed.

You are aware that the union has asked us to reinstate strikers. Several of you have asked us how this will effect you—and, if we have to rehire them. You are entitled to an explanation—Those of you who are doing your jobs have nothing to worry about, you won't be replaced by anyone. Our company lawyers will require us to rehire some of the strikers. The company could expose itself to large financial losses if it refused to rehire the strikers. We simply could not afford to take that risk.

I want you to understand that the strikers who will be rehired will not enjoy any special privileges or benefits. They will be required to do their jobs and follow the rules just like everyone else.

We ask that you give us your cooperation and that there be no trouble in the plant. I know that some of us don't like this but there is nothing we could do about it.

Let us hope this union issue has come to an end. Let's continue to work together to make this a good plant with a good future. Thank you.

On December 5, 1967, Respondent wrote the Union that it no longer recognized the Union. On December 22, 1967, just before making awards to employees for 20 years' continuous service with the Company, President Guthunz told the employees:

> This is the time of year when one looks back on the past year also, likes to anticipate what the year ahead looks like.
>
> When I talked to you last Christmas there were 876 total employees. I would like to read you two paragraphs from that talk and I quote,
>
> "I think you know we are not going to knuckle down to such tactics. We are absolutely determined. Over the past 14 years, with the help of many people, I built this operation from 500 to 1,350 employees.
>
> "I plan to build it back to where it was before the strike, but it is not going to take 14 years. We are going to do it in 4 or 5 months."
>
> In looking over the number of people here today, I can only say we did what we set out to do—we did what we promised to do—*which is more than I can say for another group.*
>
> Some of you have asked in the past few days what the status of the union situation is? All I can tell you is that the union has given up the strike and it is over. The union as filed a number of charges against the company. We don't know when these charges are going to be tried and our lawyers tell us that it will be probably two or three years before we get any final court decision. We don't feel any of the charges can stand up and they represent the union's last gasp. I am sorry I cannot tell you any more than that, but it looks as though it will be a long time before we get *this union mess* finally and completely behind us.
>
> I do know, however, we have gained an awful lot in the long year just past—thanks to so many of you.
>
> *Now the strike is over and we have written the union that they no longer represent the majority of our em-*

ployees. From here on, our progress can only continue to go forward.

The year ahead looks like a bright one for us—we feel business will be good and that we can all look forward to plenty of work. We expect to complete our engineering program in all plants in Little Rock during the year and feel that this will benefit everyone. [Emphasis supplied.]

E. *Applicable Principles.*

What is meant by good faith bargaining has been the subject of a considerable body of decisional law." "[G]ood faith bargaining means more than 'going through the motions of negotiating.' '. . . the essential thing is rather the serious intent to adjust differences and to reach an acceptable common ground.' "[12] As the Act explicitly states, fulfillment of the obligation to bargain does not compel an employer to agree to a proposal or to a concession. "On the other hand while the employer is assured these valuable rights, he may not use them as a cloak. In approaching it from this vantage, one must recognize . . . that bad faith is prohibited though done with sophistication and finesse. Consequently, to sit at a bargaining table, or to sit almost forever, or to make concessions here and there, could be the very means by which to conceal a purposeful strategy to make bargaining futile or fail. Hence, we have said in more colorful language it takes more than 'surface

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11. See, e.g., *N. L. R. B.* v. *American National Insurance Co.*, 343 U. S. 395; *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149; *N. L. R. B.* v. *Wooster Division of Borg-Warner Corp.*, 356 U. S. 342; *N. L. R. B.* v. *Insurance Agents' International Union, AFL-CIO*, 361 U. S. 477; *N. L. R. B.* v. *Benne Katz, etc., d/b/a Williamsburg Steel Products Co.*, 369 U. S. 736.

12. *General Electric Company*, 150 NLRB 192, 194, quoting *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149, 155 (Frankfurter, J.), and First Annual Report of the National Labor Relations Board, p. 85. See also *Call, Burnup, and Sims, Inc.*, 159 NLRB 1661.

bargaining' or 'shadow boxing to a draw' or 'giving the Union a run-around while purporting to meet with the Union for purposes of collective bargaining.' ''[13] Whether or not an employer's bargaining conduct reveals such a strategy is a question to be determined from an assessment of the totality of his conduct.[14]

"The duty of management to bargain in good faith is essentially a corollary of its duty to recognize the union. Performance of that duty therefore also contemplates full acceptance by management of the representative status of the union, not as a bare adviser, but as a joint participant in the establishment of wages, hours, and working conditions." *General Electric Company*, 150 NLRB 192, 268.

The purpose of imposing legal duties upon employers to meet and bargain with the representatives of employees is to create a structure of industrial self-government for a particular plant arrived at by consensual agreement between management and employees within the framework of the statute. By guaranteeing employee participation in decisions relating to wages, hours, terms and conditions of employment, Congress made a determination that this would create an environment conducive to industrial harmony and eliminate costly industrial strife which interrupts commerce. *Fibreboard Paper Products Corporation* v. *N. L. R. B.*, 322 F. 2d 411 (D. C. Cir. 1963).

The issue here is whether Respondent discharged its obligation in the manner and spirit commanded by the law, or whether it did so in the manner and spirit condemned in such cases as *N. L. R. B.* v. *Whittier Mills Company*,

13. *N. L. R. B.* v. *Herman Sausage Company, Inc.*, 275 F. 2d 229, 232 (C. A. 5), 45 LRRM 2829.

14. *N. L. R. B.* v. *Herman Sausage Co., Inc.*, *supra*; *N. L. R. B.* v. *Texas Coca-Cola Bottling Company*, 365 F. 2d 321 (C. A. 5), 62 LRRM 2487.

et al., 111 F. 2d 474, 478 (C. A. 5); *Stonewall Cotton Mills, Inc.* v. *N. L. R. B.*, 129 F. 2d 629, 631 (C. A. 5), cert. denied 317 U. S. 667; *N. L. R. B.* v. *Athens Manufacturing Company*, 161 F. 2d 8 (C. A. 5); *N. L. R. B.* v. *Herman Sausage Company, Inc.*, 275 F. 2d 229 (C. A. 5).

F. *The Negotiations.*

1. The Early Meetings.

Some 30 meetings took place between representatives of Respondent and representatives of the Union, from March 23, 1966, to July 21, 1967. The parties met at reasonable times and places and negotiated. Each side made many proposals and counterproposals, orally and in writing. Respondent's principal negotiators were President Guthuns, its negotiating attorney Frederick A. Kullman, and Kellwood Company's employee relations director William S. Keeline. The Union's principal negotiators were its vice president and regional director for its St. Louis region, Frederick E. Sioms, and its negotiating attorney, James E. Youngdahl. They, with others, were accompanied at "formal" bargaining sessions by an employees' negotiating committee[15] of up to 20 employees from the Little Rock plant. All the sessions were held in Little Rock, Arkansas, except for two in St. Louis (Clayton), Missouri and one in New York City, New York. The St. Louis meeting on September 22, 1966, and the New York meeting on September 29, 1966, were arranged in order to bring the top officers of the contending forces together, Kellwood Company's president, Fred W. Wenzel, and the Union's president, Louis Stulberg.

The "formal" bargaining sessions occurred in 1966, on March 23; April 4, 5, 12, 13, 21, 22; May 3, 4, 16, 17, 31;

15. This committee is sometimes referred to herein as the employees committee. It is the only employees' committee involved herein.

June 1, 6, 7, 20, 21, 29; July 19; and October 24. A mediator was present on October 24. The strike began October 25. During the strike meetings were held with mediators on January 24, 1967, and July 21, 1967. On December 5, 1967, Respondent notified the Union by telegram that it no longer recognized the Union as the collective bargaining agent of the employees.

In addition to the formal negotiating sessions, there were several "informal" meetings of company and union representatives in the absence of the employees' committee. These occurred on June 25 and 28, July 18, August 29, September 22 and 29, and October 6 and 10. On September 22 in St. Louis and on September 29 in New York, the Union had brought along from Little Rock some members of the employees' committee to be available to sit in at the negotiations, if at any time it appeared there was possibility of consummating an agreement. The employees' committee was never called in.

At the early meetings in March, April, May, and June, 1966, proposals were exchanged, explained, and discussed by both sides.[16] It was brought out that the plant minimum

16. Concerning what happened during the negotiation sessions, I have relied in large part upon Youngdahl's testimony. Youngdahl appeared to me to be a truthful witness doing his best to relate the events of a long series of bargaining meetings. He was assisted by his contemporaneous notes. To a lesser extent I have relied on Keeline's testimony and notes. Sometimes the detail in his testimony suggested that Keeline's memory or alleged memory was almost too good to be real and true. As is seen below, Keeline's testimony concerning the July 19, 1966, meeting cast a shadow upon his credibility. To a limited extent I have relied on Guthuns' testimony. Guthuns was strongly biased against the Union and this clearly colored his memory and his testimony. He had no contemporaneous notes to assist him. He was at times self-contradictory. On some matters I have relied upon Personnel Manager McClain's write-up of the sessions based upon his contemporaneous notes. In general, I have resolved conflicts in the testimony on the basis of my observation of the demeanor and credibility of the witnesses and what upon the record as a whole appeared to me to be the inherent probabilities in the situation.

wage was $1.25 an hour (the then Federal minimum), and that the base rate for piece rate workers was 27½ cents an hour higher. At two meetings in April, the Union made a wage proposal which included a minimum wage of 25 cents above the legal minimum. At about this time the parties expressed their expectation that Congress would increase the minimum wage and that the new amount would be $1.40 per hour.

At the suggestion of Respondent's skilled negotiators, Mr. Kullman, at Kullman's first appearance at the sessions on April 12, the parties discussed noneconomic subjects; they did so almost to the point of exhaustion prior to getting into the economic issues which both sides knew were the crucial ones. Kullman said Respondent wanted to get the noneconomic issues out of the way first and that Respondent would not bargain piecemeal. There were many proposals and counterproposals on many points, some of them small points but not necessarily unimportant to the proponents. This was the period that laid the ground work for a judgment that Union President Stulberg announced later to the Union's general executive board. Stulberg referred to "protracted, futile talks with a firm that seemed intent on negotiating the Union to death." There was evidence that the Company, also, thought the negotiations were dragging. Siems was trying to break through the Kullman "lawyer's talk" and thinking and get to the operating men, such as Guthunz, with whom Siems thought he could conclude a contract. Kullman rubbed Siems the wrong way with his emphasis on wordy specificity and his constant efforts to anticipate every question that could possibly arise under the proposed clauses and to answer them in advance. Siems was trying to get across the idea that in order for the Union and the Company to be able to work together a degree of trust would have to develop, some solutions would have to be left for later solution by

their joint good sense, and every little possibility could not be anticipated and solved in advance in written words. Although Sloma never in words asked that Kullman be removed from Respondent's bargaining team, Keeline volunteered that Respondent was going to keep Kullman.

At the meetings from March through June, the parties adjusted many positions. Many of the adjustments occurred on June 28 and 29. They reached tentative meeting of the minds concerning the wording of a number of articles, including the preamble and articles concerning mutual obligations, recognition, discharges and discipline, assignments and distribution of work, chairman—shop committee, jury duty, reporting, waiting and machine down time pay, layoff and rehire, access to shop, fire prevention, termination of rights, management functions and rights, additional provisions, conformity to law—savings clause. These related mainly to noneconomic matters. Whether the tentative agreements were to become final depended on whether a meeting of the minds on all subjects was ever achieved.

At the conclusion of this first 4 months of bargaining, there remained on the bargaining table a number of subjects on which the parties had not reached tentative meeting of the minds. There had been discussion on all or most of these subjects. These included a non-discrimination clause, trial (probationary) period, check-off, hours and overtime, wages, assignment to other work, holidays, benefit funds, escalator or cost of living adjustments, change in legal minimums, vacations, no strike-no lockout, grievance procedures including arbitration, waivers.

The evidence is in dispute as to whether by the end of June a number of subjects had been disposed of by tentative agreement or withdrawal by the Union. Respondent contended, the General Counsel and Union disagreeing, that proposed clauses on the following subjects had been withdrawn: subcontracting, layoff and rehire, related firms,

crossing picket line, union labor, employer entity, subsidiary or affiliated firms, struck work, agency, nonpayments. Of these, only the picket line clause needs further consideration.

At the conclusion of the June 20 bargaining meeting, the parties adjourned until July 18.

As to the Union's *picket line* clause, it was one of a number of clauses that Youngdahl told Kullman in New Orleans on June 25 that the Union would *probably* withdraw, although he told Kullman that the Union *would* withdraw a number of other clauses. The picket line clause was one of many clauses discussed and adjusted on June 28 and 29, and the Union certainly indicated that it would probably withdraw it if a contract was reached. Youngdahl did not include the picket line clause in a list of 17 "issues remaining" after the June 29 meeting. At the September 22 and 29 meetings, Union President Stulberg placed importance upon this clause, as is seen below, and the testimony of Youngdahl proves that Stulberg was surprised when Kullman told him the Union had withdrawn it. Stulberg turned to Sloma and asked if that was so, Sloma relayed the question to Youngdahl and Youngdahl's remembrance was that it had not been withdrawn. In summarizing the negotiations to a mediator on November 16, Guthunz related that Sloma had said the picket line clause was not important, *not that Sloma had withdrawn it*, according to Keeline's notes. Although Guthunz was not present on June 29, he kept close tab on the negotiations and would have known whether Respondent considered the picket line clause withdrawn.

Keeline testified that on June 29 Sloma withdrew the picket line clause, that he so recorded on his notes of that meeting (which notes reflect such an entry) and that he saw Kullman make a note to that effect on a list of clauses.

Neither Kullman nor Sloma were called to testify by their respective parties, although Kullman was in the hearing room during the entire hearing and Sloma was in and out of the hearing room during the hearing.

Keeline's credibility is under serious question because of his testimony about the July 19 meeting, which other testimony showed he did not attend. Youngdahl named those at this meeting and did not include Keeline. Youngdahl's contemporaneous notes of the meeting do not list Keeline as present. The notes of Respondent's personnel manager, McClain, were written up 3 days after the meeting from notes made at the meeting, and do not show Keeline present. Keeline kept notes at the meetings he attended, which are in the record, and the record has no notes of Keeline's for this meeting. Under all the circumstances, I find that Keeline did not attend the July 19 meeting and that his testimony about this meeting was based upon something other than his recollection. Under these circumstances, Keeline was less than a fully credible witness and I do not credit his testimony that Sloma withdrew the picket line clause on June 29.

Upon the preponderance of the evidence, I conclude that the most in Respondent's favor that can be concluded is that prior to President Stulberg's entrance into the negotiations, the Union did not give the importance or emphasis to the picket line clause that Stulberg gave to it; and that when Stulberg raised it on September 22, he was unaware that Sloma had down-played it.

2. Respondent's First Economic Offer Followed by Unfair Labor Practices.

Respondent presented its first economic package of proposals to the Union at informal meetings on June 25 and 28. This package included Respondent's first wage proposal, consisting of a 5-cent raise above the minimum wage

to $1.30 on the effective date of the proposed contract, a 10-cent raise to $1.40 on July 1, 1967, a 5-cent raise to $1.45 on July 1, 1968, and a 15-cent raise to $1.65 on February 1, 1969. Respondent's proposal was, further, that if the Federal minimum wage was changed by Congress, Respondent's proposals were in addition to, or on top of, the new minimum wage. The base rate for pieceworkers was to be increased by the same amounts and the differential between hourly rates and piece rates held at the current 27½ cents.

On July 18 began a change in the Union's attitude towards Respondent's bargaining practices, which was occasioned by Respondent's actions away from and at the bargaining table. The record sustains the conclusions that before and after this date the Union wished to believe that Respondent was bargaining in good faith, but that beginning on this date the Union strongly suspected that it was not.

On July 18 Respondent announced to its Lonoke employees that it was giving them a 10-cent wage increase effective August 1; and minutes later, but not before, Respondent offered the same increase to the Union in the negotiations at Little Rock. In making the offer to the Union, Respondent told the Union that Kellwood was putting the 10-cent increase into effect at all its other plants (more than 30) on August 1. This was an informal meeting with Kullman and Guthunz representing Respondent and Youngdahl and Sloma representing the Union.

As has been seen above, the Lonoke plant is a part of the Ottenheimer Division under Guthunz and is about 25 miles from Little Rock. In announcing this wage increase to the Lonoke employees on July 18, Plant Manager McKibben of the Lonoke plant read a speech written by Guthunz on July 18. After writing it, Guthunz cleared it with a lawyer in Kullman's law office. The speech read as follows:

Mr. Guthunz has just returned from a Division Presidents Conference of all Kellwood plants and as a result of action taken at that meeting, I am pleased to announce that effective August 1, 1966, wages will be increased 10 cents per hour to all time workers and all incentive rates will be increased by 10 cents per hour.

In addition, the guaranteed minimum rate of pay will be increased 10 cents to $1.35 per hour for all employees with 90 days service with the company.

The increases are in line with Kellwood policy to continue a progressive program of providing wages and benefits to the best of its ability. This increase was made possible by you and your company working together to make this plant a success.

You did not have to pay one cent in union dues to get this increase. It was not necessary for you to call on any union outsiders to speak in your behalf in order to get this raise.

Our company has always followed the policy of improving wages and working conditions whenever it was able to do so and it will continue to follow that policy in the future. No union can force us to do more than that. This increase should be proof that a union is not needed by a company like ours that treats its employees fairly and rewards them for their good work.

In closing, let me say this, and I hope you will always remember—you will always receive the same rates of pay, the same benefits and the same fair treatment as the Ottenheimer employees in Little Rock, and you will receive the same rates of pay, the same benefits and the same fair treatment as those employees without having to pay union dues or union fees.

Again, let me say that it is with a great deal of pleasure that I announce today, this wage increase.

Although Guthunz had written this speech and was present with Kullman at the July 18 meeting with union representatives in Little Rock, which began at 4 p.m., neither of them initially mentioned the Lonoke wage increase or

its impending announcement. Kullman made Respondent's 10-cent wage offer some 20 minutes after the session was under way with other topics, and stated that Kellwood was going to put a 10-cent raise into effect in all other plants effective August 1. Kullman stated that this decision had been made at a meeting of Kellwood officials in California. Within minutes thereafter and before the union representatives had expressed any or much reaction to the offer, the union representatives, Youngdahl and Siems, received a phone call from a union official telling them about McKibben's speech and Respondent's announcement of the raise to go into effect at Lamoke on August 1, 1966. Upon these facts, I conclude that Respondent announced the raise at Lamoke, minutes before offering it to the Union at Little Rock.

Siems returned from the telephone call and told Guthunz and Kullman in strong language that he thought Respondent was bargaining in extremely bad faith to give wage increase to other plants and then offer it to the Union in negotiations. Kullman replied that Respondent was not giving the fringe benefits at the other plants which it was offering in the negotiations and so it was not the same offer. Siems challenged this. Siems said that Respondent's wage offer was unsatisfactory to the Union because of the way it was announced in other Kellwood plants first, and also because Respondent was not offering any more than would be required by the impending change in the Federal minimum wage law. Siems, showing anger, expressed himself strongly and repeatedly to the effect that in the handling of this wage increase and offer, Respondent was bargaining in bad faith with the Union. For the first time, a bargaining session ended on this very unfriendly note.

The company decision to grant a company-wide[17] 10-cent

17. Two plants were excluded because they were being re-engineered.

increase on August 1 and announce it July 19 had been made at a Los Angeles meeting of the division presidents and President Wenzel on about July 11, 1966. The Board has recently held that the granting of this wage increase was motivated in part by antiunion considerations,[18] and that the promising, announcing, and granting of it at Lonoke and the granting of it at the Alamo plant of Kellwood's Southern Division, were in violation of Section 8(a)(1) of the Act.[19]

The division presidents and President Wenzel in California were fully aware of the pending Little Rock negotiations and were briefed concerning them by Kellwood Company's employee relations director, Keeline. In Case 170 NLRB No. 184, Keeline testified that the division presidents discussed the prevailing organizational efforts of the Union. In Case 170 NLRB No. 183, President Wenzel testified[20] that some time during the several day period of the meetings in Los Angeles,[21] he had a discussion with Guthunz and Keeline, during which they decided to make the 10-cent offer to the Union in the Little Rock negotiations on July 18. At that time they were aware that the next Little Rock negotiations between the Company and the Union had been scheduled for July 18. Wenzel testified that July 18 was chosen because that was the first date all

18. Of significance is the italicized phrase used in the minutes of a Kellwood board of directors meeting of July 28, 1966. The pertinent sentences read as follows:

> Mr. Wenzel reported on the Division Presidents' Conference held in Los Angeles on July 11, 12 and 13, 1966. Mr. Wenzel reported on the granting of a wage increase of 10 cents per hour to hourly paid employees exclusive of those represented by the *I. L. G. W. U.* effective August 1, 1966. [Emphasis supplied.]

19. 170 NLRB No. 183 and 170 NLRB No. 184.

20. See fn. 9, supra.

21. Guthunz testified before me that this discussion occurred after the division presidents' meetings had been concluded.

the division presidents would be back in their respective localities and Respondent wanted to make the announcement country-wide at the same time. He and Guthuna stated that one of the reasons for granting the raise was to demonstrate to the employees that they could get a raise or benefits without a union. In that case, Wenzel testified that the primary reason for the increase was to attract better help, that they were having trouble attracting qualified help; Guthuna testified before me that this was one of the reasons. Neither said anything about the raise being pursuant to a "progressive program of providing wages and benefits to the best of its ability" which Guthuna wrote for McKibben to read to the Lamoke employees. Guthuna testified that, "I would think that if you grant wage increase to your employees, it is evidence that . . . the employees do not need a union in my opinion." Significantly, the Guthuna-McKibben announcement did not tell the employees that Respondent's policy was to endeavor to establish "minimum employee benefit standards."

Guthuna testified before me that he did not consider giving the Union notice prior to July 18 of the company-wide wage increase Respondent was going to announce that day, effective August 1.

No reason appears why Respondent could not have offered the raise to the Union on July 18 and thereafter, say on July 19, announced it to employees company-wide, thereby giving the Union an opportunity to bargain concerning it for the Little Rock employees before announcing it company-wide. Under all the circumstances, it must be concluded that one of the reasons Respondent timed the announcement for July 18 instead of, say July 19, was to maximize its adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations.

Respondent's alleged primary reason for making the

raise was to attract better help. Assuming the truth of that statement, it would appear that the sooner the raise became effective, the sooner it would attract better help. No reason was offered for the 2-week delay between the announcement on July 18 and the effective date August 1. Under all the circumstances in this record, it must be concluded that at least one of the reasons for the delay was to maximize the adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations. Thus, the delay allowed a 2-week period of time for Little Rock employees to contemplate the futility of their situation, to withdraw from the Union, and to pressure the Union to accept Respondent's offer, even though the Company and the Union were far from consummation of a contract. That the Little Rock employees would promptly hear of the announcement to the Lonoke employees, and that Respondent intended they should, is not open to question, since the same Union and the same union leadership was concurrently bargining for the Little Rock employees and trying to organize the Lonoke employees and since both groups of employees were in the same corporate division under Guthrie. In the representation case, Respondent had tried to get the Lonoke employees included in the same unit as the Little Rock employees. Indeed, at a negotiation session on July 19, if not before, the Little Rock employee negotiating committee learned about Respondent's *fait accompli* at Lonoke and heard Sisco complain in anger to Respondent's representatives about their bad faith and their effort to undercut the Union's bargaining status by offering the Union the wage increase it had already announced at Lonoke and other plants."[22]

Respondent could have simply told the Lonoke employees it was giving them the raise, without any reference to the

22. The findings in this sentence are based upon the credited testimony of Youngblood.

Union or the Little Rock employees. Instead, Guthrum went out of his way to tell the Lonoke employees, contrary to the admitted fact, that the Union had nothing to do with their getting this raise. And instead, Guthrum emphasized that the employees did not need a union, did not need to pay union dues and fees, and would get the same rates of pay and benefits the Little Rock employees would get, a message Guthrum surely intended for the Little Rock employees as well as the Lonoke employees. If the Little Rock employees could be brought to realize, as Guthrum must have intended, that their union bargaining representative was ineffectual in getting them a raise and that it was futile for them to support the Union further, he would have undercut the Union's strength and bargaining power and would have accomplished his purpose.

Respondent's timing and language in announcing this increase to the Lonoke employees clearly tended to obstruct and inhibit the actual process of discussion of wages thereafter in the Little Rock negotiations. Respondent's timing and language was clearly aimed at undercutting the authority and prestige of the bargaining representative at Little Rock and of creating the image of the employer as the protector of the employees rather than the Union. Cf. *Wagerose Sportswear*, 170 NLRB No. 139. The timing and manner of this act changed the course of the Union's bargaining thereafter and was one of the important factors that ultimately led to the strike. The timing of this increase and this McKibben speech written by President Guthrum, viewed in the light of Respondent's massive anti-union pre-election campaign, revealed Respondent's true attitude towards the Union and its rejection of the principle of collective bargaining, although it had gone through the motions of bargaining for some 4 months at some 30 meetings. Upon the preponderance of the evidence, I conclude that Respondent's wage offer made to union repre-

sentatives and employees on July 18 and 19 was made in bad faith and indicated that Respondent was bargaining in bad faith. The July 19 session between the parties ended with Kullman urging the Union to come up with a counterproposal and Sierns urging Kullman to increase the Company's offer up to what the Company's competitors were paying. McClain's notes quote Kullman as uttering this limited concept of collective bargaining: "Collective bargaining is the proposition of each side presenting proposals and counterproposals." Sierns said he did not think the Union had to present a counterproposal to such a low proposal as Respondent's and that Respondent should pay what its competitors pay. Kullman said that "we are not going to discuss what Kellwood can or cannot pay." Earlier Kullman had said he was not saying whether Kellwood could or could not afford an increase. At the end, Sierns said "any time you are ready to make another proposal we are available. . . . We are willing to meet any time you want to." Kullman replied: "That's fine, we are willing to meet any time you feel we can accomplish anything. . . . I think it should be up to you to present us with a counterproposal at our next meeting."

For the first time a negotiation session ended without the time for the next one being set. It ended, as the record showed, with Sierns angry over Respondent's Lonoke announcement and its effect upon his bargaining position, and also over Respondent's low economic offer which, after a discussion with the employees' committee, Sierns announced was unsatisfactory to the committee. It ended with both sides trying to put the responsibility for calling the next meeting upon the other.

The company-wide wage increase went into effect on August 1 on schedule, in all plants including Lonoke, except the two being re-engineered where the increase would be reflected in the re-engineered rates. Respondent's ef-

fectuation of this maneuver at Lonoke in the face of the Union's protest of Respondent's bad faith at the July 18 and 19 sessions. Respondent knowing and intending it to undermine the Union's strength and bargaining power in the Little Rock negotiations, was a further indicia of bad-faith bargaining at Little Rock.

3. Negotiations Continue.

While each side was waiting for the other to make the next move, the Union in its leaflets was taking note of the strike talk in the plant and counseling patience. Although the bulletins, with one exception, did not mention Respondent's Lonoke maneuver, they could scarcely do so without admitting the Union's embarrassment at finding itself in the position of bargaining for a first raise at Little Rock when the employees at the related Lonoke plant already had a raise; and in the position, therefore, of being vulnerable to the accusation that the Union was holding up a raise to the Little Rock employees. Further, as the record showed, at this point the Union wished to continue trying to get an acceptable contract in Little Rock, not to strike or process a refusal-to-bargain charge before the Board; although it also, through its leaflets, tried to keep its "troops" in line for a strike if one became necessary; and although it delayed the negotiations somewhat until Stolberg could get from the Union's general executive board authority to strike the plant if that became necessary, which permission was granted in early September.

Although during several negotiation sessions in June Sierra had tried to get Respondent to agree to discuss the decisive issues, primarily wages, in the absence of the employees' committee, so as to minimize the political impact of the negotiations in the plant, Respondent's Lonoke play made it quite evident that he did not succeed, and confirmed Respondent's testimony that there was no such agreement.

In any case, if there was any such short-lived agreement, the Union's leaflets showed that the Union abandoned it after Lemoke. On the entire record I do not credit Youngdahl's testimony that the "agreement" lasted into October.

During the period after July 19 when there were no sessions, the Union made several requests of Respondent for information, which Respondent supplied.

On August 18, 1966, Siems made a new wage proposal to Keeline over the telephone and demanded higher benefits in Respondent's hospitalization, accident and sickness, and pension proposals. Siems' wage proposal included a first increase of 20 cents an hour.

On August 23, 1966, Keeline telephoned Siems and persuaded him to meet with Kullman and Keeline at the St. Louis airport. Siems' assistant accompanied him. This initiative followed immediately upon a high-level meeting in St. Louis that day of Kellwood Company President Wemel, Ottenheimer Division President Guthuns, Kullman, and Keeline. Pursuant to instructions received at the earlier meeting from Wemel and Guthuns, Respondent's Kullman told Siems the negotiations were "holding up" the wage increase to the Ottenheimer employees, which had been received by all other Kellwood employees, that they thought they were close to an agreement, that Respondent wanted to put the 10-cent increase into effect September 30, retroactive to August 1. Siems asked why they were telling him this and answered his own question with the observation that it was to avoid an unfair labor practice charge. Respondent's expert negotiator, Kullman, "just kind of grinned and shrugged his shoulders," but did not reply. Siems counterproposed no retroactivity but a 15-cent raise, effective October 1. Siems added, as though an afterthought, words to the effect that if the Respondent did that, it would probably raise the rest of the plants the additional

5 cents. Sierns asked what Respondent was going to do February 1. Kullman replied that a raise for February 1 was "open for discussion (that is, negotiable)," but that Respondent was not going above a dime for the first raise. The parties then discussed Sierns' earlier suggestion that they have a negotiating session in New York where they could meet with Louis Stulberg, the Union's new president. At the conclusion of the meeting, Sierns told Respondent not to put the 10-cent increase into effect, that the Union did not agree with it.

Pursuant to arrangements made on August 29 after the conclusion of the above session, the parties next met on September 22 in President Wenzel's office in St. Louis, with President Stulberg coming for the meeting. A week later on September 29, Respondent's negotiating team, including Wenzel and Guthuna, went to New York and met the union team including Stulberg at the Union's headquarters. The union representatives took part of the Little Rock employees' negotiating committee to St. Louis and to New York and held them in standby. Respondent was told the employees' committee was there and that the Union was prepared to call the committee in, if the negotiations reached a basis for agreement. Both sides knew that with the top men present these were the crucial meetings of the entire negotiations. The parties seemed to make bargaining progress at these meetings but the employees' committee was not called in at either meeting.

4. The Crucial St. Louis and New York Sessions.

The September 22 session in St. Louis, an "informal" meeting, began with 17 issues remaining to be resolved and ended on a note that some of them were disposed of or able to be resolved if a contract eventuated. This was achieved through give and take by both parties. The issues disposed of or agreed as resolvable related to the following subjects:

no discrimination, trial period, checkoff, hours and overtime, assignment to other work, contracting out, and possibly others. The parties agreed that cost of living adjustments, changes in legal minimum wages, and new products were economic issues and would be discussed with other economic issues.

The parties continued their existing disagreement on holidays, vacations, and the timing of when a pension program and a health and welfare program should go into effect. The Union continued its objection to Respondent's holiday proposal of six holidays on the ground that that was Respondent's current practice and the Union wanted more. The parties continued their long existing disagreement on timing, the Union wanting the health and welfare program to start with the consummation of a contract and the pension program to start the following year, and Respondent wanting the timing just reversed.

The testimony is in conflict as to whether Respondent, through Kullman, made a new wage proposal at this meeting, the General Counsel and the Union contending that it did and Respondent contending that it did not. Of significance is that if Respondent did make a new offer, this offer retained Respondent's position of being willing to grant only a 10-cent wage increase the first year.

It is certain, on the record, that the Union's president, Stulberg, made a new wage proposal at this meeting. Stulberg suggested "10, 10, 10" but did not spell out just when these three 10-cent increases would go into effect. This failure is not to be continued. Stulberg testified that he meant 10 cents above the Federal minimum. At that time both parties knew that the new Federal minimum wage bill was to be signed by the President the following day and that it raised the minimum wage from $1.25 to $1.60 per hour on February 1, 1967, and to $1.60 on February 1, 1968. The General Counsel and the Union contended that Stul-

burg's proposal intended the first 10 cents to go into effect on the effective date of the contract, the second on February 1, 1967 (which on top of the new minimum wage would bring Respondent's minimum wage to $1.50), the third on February 1, 1968 (which on top of the $1.60 Federal minimum wage would bring Respondent's minimum wage to $1.70).

Respondent contended that it understood Stulberg's "10, 10, 10" to mean that the first 10 cents would go into effect on the effective date, the second on the first anniversary date of the contract, and the third on the second anniversary date. At the meeting Respondent did not, although it had ample opportunity to, ask Stulberg what he meant by his "10, 10, 10" proposal. It seems to me that it would have done so if it had been seriously bargaining with an open mind towards a contract. Further, as it seems to me Kuhnan would have known, it was highly improbable that the Union would make a wage proposal which would permit any employee to receive only the Federal minimum during two 6-month periods of the contract. In addition, Guthman understood, as he testified, that when Stulberg proposed a 2-year contract at the New York meeting the following week, Stulberg was proposing the same wages in a 2-year contract as he had earlier proposed in a 3-year contract. This would mean that under Respondent's alleged understanding, the last increase would fall at or only shortly before the expiration of the contract. The improbability of a union leader's making such a proposal, or being so understood by sophisticated company negotiators, suggests to me the bad faith of Respondent's alleged understanding of Stulberg's "10, 10, 10" proposal. Respondent's bad faith was further suggested by Kuhnan's testimony that he understood that in a 2-year contract, Stulberg's second two raises would come on February 1 each year, although, in a 3-year contract they would fall on the anni-

versary date of the contract, which would be in the late summer or fall. Since Respondent's negotiating team disagreed within itself as to the meaning of the "10, 10, 10" proposal, good-faith bargaining required that it resolve its doubts by ascertaining the facts, before accepting the proposal—which it did not do. Upon the preponderance of the evidence, I hold that Respondent's alleged misunderstanding of Stulberg's proposal was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process.

This was the Union's first expressed willingness to settle for a first raise of 10 cents. As has been seen above, the Union started the negotiations with a demand for a minimum wage of 25 cents above the legal minimum. On August 18, Siems asked for 20 cents. On August 29, when Siems suggested 15 cents for the first raise, Kullman announced firmly that Respondent was not going above a dime for the first raise.

Throughout the negotiations, Respondent had sought a longer term contract, such as 3 years, so as to stabiline its employee relations. Its original proposal talked of a 5-year contract. The Union had sought a shorter contract, such as 1 year or 2 years, hoping no doubt to negotiate a stronger second contract when it became more entrenched in the Company. On September 22, the parties understood that Stulberg's "10, 10, 10" proposal related to a 3-year contract.

During the St. Louis meeting, President Stulberg placed considerable emphasis upon the Union's need for a picket line clause. Respondent contended Stulberg said he would not sign a contract without a picket line clause. According to the General Counsel's evidence, Stulberg stated it less strongly. Stulberg explained that the Union needed a picket line clause so that if it had a dispute at some other plant of Kellwood, it could picket the Ottenheimer plant and the

Ottenheimer employees would remain away from work, thereby giving the Union this economic strength in settling the dispute at the other plants. Stulberg made it clear that the Union intended to organize all of Kellwood."[23]

At the September 22 meeting, there was a long discussion about arbitration. Respondent gave the argument it had given throughout the negotiations against arbitration, that it did not believe in giving authority to a third party who had no responsibility. At the end of this discussion, Respondent offered to Siems a "gentlemen's agreement": That Guthunz would agree to arbitrate any issue except piece rates that Siems requested if Siems would agree to arbitrate any issue Guthunz requested. Respondent testified that Guthunz and Siems shook hands on this proposition. Guthunz refused to put it in writing. This unwillingness to put into writing an agreement upon a given issue was further proof of bad-faith bargaining.

The September 29 meeting at the Union's headquarters in New York City opened with Respondent's negotiating attorney, Kullman, stating that there remained four major issues: wages, an escalator or cost-of-living clause, arbitration of piece rates, and the picket line clause. He said that Respondent was willing to accept Stulberg's proposal of "10, 10, 10," but not the other three. As has been noted,

23. Stulberg's use of the picket line clause was for bargaining purposes at Little Rock. The record does not show, as contended by Respondent, that the Union's objective in the Little Rock negotiations was firstly to get a picket line clause to help it organize the rest of Kellwood. Stulberg's first objective in using the picket line clause as he did was to get the best contract he could for the Little Rock employees. The way for him to convince employees of other Kellwood plants that they should join the Union was to be able to show them the good wage increases and benefits the Union achieved for the Little Rock employees. To be able to do this, it was an absolute necessity that the Union achieve a contract at Little Rock; and this, I find, is what Stulberg was trying to do. To this effect, Stulberg credibly testified that "We wanted to get an agreement with this firm. We wanted to protect these people."

Stulberg's "10, 10, 10" offer of September 22 related to a 3-year contract. After a break to give the union representatives time to caucus, Stulberg returned and said the Union would capitulate on the picket line clause if Respondent would agree to a 2-year contract instead of a 3-year contract. Stulberg added that he would accept a "bare-bones" contract for a short time—1 or 2 years, without a picket line clause, in order to get a foothold with Kellwood in recognition of the Union's position as bargaining agent.

After another break to give the Company an opportunity to caucus, Kullman said "you have a contract," that the Company would take a 2-year contract without a picket line clause. Up to this point, there had been no discussion as to what the money increases would be under a 2-year agreement. There then followed a very confusing half hour or so when Stulberg explained what he had meant by his "10, 10, 10" proposal in St. Louis and stated that he would expect the same raises in a 2-year contract as in a 3-year contract, namely: 10 cents to $1.35 upon the effective date of the contract; 10 cents on top of the Federal minimum February 1, 1967, to $1.50; 10 cents on top of the Federal minimum February 1, 1968, to $1.70. Respondent's representatives told Stulberg what they allegedly understood his proposal in St. Louis to be, as has been set forth above, and accused him of changing it in New York. There and at the hearing herein, Stulberg credibly denied making different wage proposals in St. Louis and New York.

Of a certainty, there was no meeting of the minds in New York, even for a split second. In fact, Respondent was bargaining in bad faith on wages and a meeting of the minds requires good faith on both sides. But assuming Respondent was bargaining in good faith, Kullman's acceptance of a 2-year contract without a picket line clause did not include the wage increases intended by Stulberg. Assuming good faith, the parties had two different con-

ceptions of Stulberg's "10, 10, 10" offer and two different conceptions as to what raises would go into a 2-year contract as distinguished from a 3-year contract. These different ideas never got together in a meeting of the minds.

Respondent contended that Stulberg changed his "10, 10, 10" offer in New York from his offer in St. Louis. Guthunz and Keeline quoted Stulberg as saying in substance they should forget what he said in St. Louis, that he was in New York now. Youngdahl remembered no such testimony. On credibility grounds and on the entire record, I do not credit it. I do not believe Stulberg would have been so indiscreet or was so lacking in good judgment as to have said that. Further, I can conceive of no good to his cause that Stulberg could have hoped to gain from any such maneuver. Stulberg wanted a contract covering the Ottenheimer employees, which would give him a foothold in the Company. He wanted a contract with enough economic gain for the employees to be acceptable to them. But playing games about the amount of raises would not be apt to lead to a contract, as a president of an International Union would have known.

If there was any trickery, the entire record, including Respondent's antiunion pre-election campgain, suggests that it was more apt to have come from the Company than the Union, in an effort to contrive seeming agreement on wages it knew the Union did not intend and which foreseeably would be repudiated by the Union; thus casting a shadow upon the Union's bargaining and putting itself in the clear of a bad-faith bargaining allegation.

The New York meeting adjourned with the understanding that Wenzel would take the situation as it then stood, including the picket line issue and Stulberg's "10, 10, 10" as he had explained it at that meeting, back to Kellwood's

executive committee and that Respondent would be in touch with the Union in the near future.[24]

As the New York meeting was breaking up, Kullman told the Union that Respondent reserved the right to put the first 10-cent raise into effect. A union attorney replied that the Union heard him, did not agree that Respondent should do it, asked Respondent not to do it; and Stulberg said, "if you do we will start from there."

At their hotel, immediately after leaving this meeting at the Union's headquarters, Wenzel told Respondent's negotiating team that he was not going back to the executive committee, that he already had his instructions from them. It thus appears that Wenzel indulged in a deceit with the Union on this matter. Kullman suggested that if the Company went half way between what it allegedly understood as the meaning of Stulberg's ,'10, 10, 10" offer in St. Louis and its present understanding of its meaning, this would bring Respondent's wage offer to its outside wage offer as decided by it in May 1966. The company team decided there and then to make that wage offer to the Union but did not decide when to do it. No member of the company negotiating team suggested that they get in touch with the Union and put the new proposal to it while they were still in New York, although it was then only noontime. Keeline's only explanation for this failure was that Respondent preferred to make the proposal face-to-face with the Union. At that time, a few moments after the company team had left it, the union team, including the top man, Stulberg, was presumably available for a face-to-face confrontation with Respondent's team, as it had been all morning. The fact that no one on Respondent's team even

24. This finding is based upon the testimony of Youngdahl, although Keeline testified Wenzel said he was going back to the executive committee only concerning the picket line clause. Youngdahl credibly testified that repeatedly during the St. Louis meeting Wenzel pleaded lack of authority on open issues.

suggested to the team that they try to contact the union team they had just left and then and there try to wind up the negotiations and reach a contract, is strong evidence to me that Respondent was trying to avoid rather than achieve an agreement with the Union. Also, as Respondent knew, some members of the Union's employees' committee were in New York and available on that Friday in September. This failure was of added significance because, as the record suggests, at the meeting just ended the situation was such that the parties appeared nearer to an agreement than they had ever been. Although the question of holidays was not mentioned and the question of the timing of the benefit and welfare funds were not mentioned and some other issues were glossed over, Youngdahl believed that if the parties could get together on the issues they were discussing in New York, that they would somehow be able to reach agreement on the other issues not then being discussed.

5. Union Rejects Company's "Final Offer."

On October 6 in his office, President Guthunz presented what he called the Company's "final offer" to the Union's representatives, Siems and Youngdahl. President Guthunz testified that he read almost verbatim from a typed document prepared in advance which is in evidence as Respondent's Exhibit 7. I credit this testimony and accept the exhibit as a correct statement of the presentation by Guthunz on this occasion. As stated in the exhibit, Guthunz opened the meeting by rejecting Stulberg's proffered 10-10-10 wage rate and a 2-year contract. Guthunz then announced he was about to make Respondent's final offer. He requested the Union to let him know its answer to the offer by Tuesday, October 11. Guthunz continued: "If it is acceptable, you may want it placed before your committee as a group, and I shall be glad to do so. If it is not

acceptable, then we are going to ask for a prompt meeting of the negotiating committee and will make public to this committee our proposal."

Guthunz' offer was for a 3-year contract without a picket line clause.[25] Impliedly recognizing the large number of loose ends left dangling during the St. Louis and New York meetings, Guthunz' offer went down the "17 points" which had been considered at the St. Louis meeting and provided for some kind of disposition of each of them. The Union was to withdraw at least 10 of its proposals, and would agree with the Company's latest proposal on the rest of them. Respondent's new wage proposal, decided upon in New York immediately after the September 29 meeting and presented to Siems and Youngdahl on October 6, was for a 10-cent raise to $1.35 effective August 1, 1966; 5 cents higher than the new Federal minimum, to $1.45, on February 1, 1967; 5 cents to $1.50 on the first anniversary of the contract; 5 cents higher than the new Federal, to $1.65 on February 1, 1968; 5 cents to $1.70 on the second anniversary date of the contract. Respondent would grant one more holiday during the third year of the contract. Guthunz said Respondent would accept 60 days for the trial or probationary period. Guthunz adhered to Respondent's unswerving position that the pension would go into effect the first year of the contract and the welfare plan on the second year.

After Guthunz had finished his proposal, Siems asked a number of questions in order to test the flexibility of the "last offer." To Siems' question as to whether this was his final offer, Guthunz replied that not legalistically, but

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25. Respondent contended in its brief that on September 22 and 29 the Union bargained to an impasse on the picket line clause. That at the very next meeting President Guthunz omitted this clause from his final offer is proof either that there was no impasse or that Guthunz wished to assure himself there would be no contract by omitting a clause the Union had demanded to the point of impasse.

realistically, it was the Company's final offer. Guthunz added that of course the Company was willing to continue to bargain. Siems asked if Guthunz would consider a 30-month contract. Guthunz replied that the Company would consider it. Siems asked if the 13 or 14 "red-circled" people could get the raises too, so that all the employees would get the raises and none be left out. Guthunz replied in effect that that could be worked out. Guthunz' offer was for the second and third increases to be effective on the anniversary date of the contract. Siems asked if they could be on August 1 each year instead of the anniversary date. Siems asked other questions. At the end, Siems told Guthunz that he would have to get in touch with Stulberg and the full committee, but that he did not think there would be any problem as long as Guthunz and Siems knew where they were going to end up.

A few days later, Youngdahl overheard the Siems end of a Siems' telephone conversation with President Stulberg during which Guthunz' offer was discussed. Youngdahl testified that Siems indicated something about whether or not he though there was any additional money available and that there were other areas of possible flexibility. Siems also said it was a large unit of employees and that a strike would be a very expensive proposition. At the end, Siems said he would continue bargaining and see what more could be gotten.

At a very short meeting in Guthunz' office on October 10, 1966, Siems and Youngdahl, speaking for the Union, gave the Union's answer to Guthunz' offer of October 6. The Union rejected the offer on the ground that it was not enough, and asked Respondent to reconsider and come up with some more. Guthunz asked for specifics as to why the offer was unacceptable as Siems did not give any. When Guthunz asked where they went from here, Siems replied "back to the bargaining table." At the end, Guthunz and

Siems were talking about having another collective-bargaining meeting with the employees' committee present.

By exchange of telegrams shortly thereafter the parties set up the next negotiating session which, after a postponement, took place on October 24, 1966. The Union then scheduled a meeting of employees for the night of October 18. Respondent learned of this meeting from union leaflets. In the meantime, the Union mailed to employees or handed out to them some four leaflets in which, for the first time, Siems was quoted as taking the position that the time had come to get ready for action rather than just words, to try to induce the Company to sign a "proper contract" with the Union. Prior to this, union leaflets had counseled patience and restraint.

6. Respondent Undertakes Again to Undermine Union and Collective Bargaining.

During working hours on October 18, several hours prior to the Union's meeting with the employees that night, Respondent passed out to employees at their machines a letter over the signature of President Guthunz, addressed "to our Ottenheimer employees regarding company proposal for a contract." A Sears Roebuck man who reported to the "Sears Vice President in charge of factories" helped draft it. Respondent did not send a copy of this letter to the Union, who learned about it from employees. The introductory paragraphs read as follows:

> Since the election last January, I haven't written to you—I haven't attempted to communicate my feelings to you. Nine months have passed. Over twenty meetings have been held. Now I feel I owe it to you to make certain that you have the facts.
>
> In a sincere and earnest effort to settle our differences and protect you from any possibility of a strike, I made a proposal to your top Union officials

on October 6 for a three-year contract which I feel is generous and fair in every respect.

Many of you have told me that you have never been provided with the details of this proposal. To help you understand it, I ask you to read carefully my proposal's highlights which are outlined below:

Then followed the highlights of Guthunz' October 6 "last offer," though his letter to employees said nothing about its being a last offer. Guthunz' set forth his wage proposals, pension, hospital and surgical insurance offers, sickness and accident benefits, life insurance proposal, seventh paid holiday, a statement that a 3-year contract would be in the best interest of the employees, and a statement of his plans to re-engineer the plant to provide employees with "additional opportunities to earn more during this 3-year period."

Guthunz' letter to the employees made no reference to Respondent's position on a grievance procedure which did not end with assured arbitration, to Respondent's position on the non-arbitrability of piece rates, or to Respondent's position that it would not agree in writing not to discriminate against employees because of age. Nor did he say anything about Respondent's proposals on vacations.

The last paragraph of this letter read as follows:

> I urge you not to permit a minority of employees to determine your future. ATTEND ALL UNION MEETINGS—EXERT YOURSELF—SPEAK UP—SPEAK OUT—INSIST ON YOUR DEMOCRATIC RIGHT TO VOTE. I hope you vote to accept this offer and end all this confusion and uncertainty!

After the signature of Guthunz, the letter contained a postscript of two paragraphs reading as follows:

> At a meeting already scheduled with your Union representatives for next Monday [October 24] this

proposal will be made again. Should you have any questions about it, they can be clarified at the meeting.

If this offer is accepted by Friday, October 28, your Company will pay you substantial back wages by making the effective date of your wage increase retroactive to August 1, 1966.

Respondent attempted to justify its issuance of this letter on the ground that the Union had not given the employees the details of Respondent's "final offer" and was building up for a strike. The entire bargaining history in this situation showed that the Union was pressing for *more* for the employees at Little Rock, and it was for the Union, not the Company, to decide how best to accomplish this. It was for the Union to decide when to tell the employees about Respondent's offer. There was no evidence that the employees' committee or any employee member in any way distrusted the Union or thought it was not working in the employees' best interest, or that the Union was not, in its view, working in the employees' best interest. Although the Union was conducting itself properly towards the employees and doing its best against great odds to get them a good first contract, this letter by Guthum was an attempt to suggest otherwise to the employees and an attempt to undercut the Union and the collective-bargaining process in the minds of the employees. It suggested again that Respondent was the protector of the employees; that the Union was controlled by a minority; and that employees were being deprived of the right to vote. In the postscript it sought to give the impression that the retroactivity would be the gift of the Company rather than the fruit of collective bargaining. Respondent could have presented its offer to the employees without attempting to undermine the Union in the process. Nothing the Union did or did not do justified this attempt by Respondent to undermine the Union. This effort to undermine the Union and

the collective-bargaining process was further evidence that Respondent was bargaining in bad faith with the Union. Further, by setting an implied deadline of October 23 for the Union to accept Respondent's wage offer, Respondent was clearly trying to establish in advance for its own bad-faith purposes when an impasse would be reached.

7. Union Takes Strike Vote.

At the Union's meeting for employees on the night of October 18, there were about 600 to 900 present. The Union's vice president and regional director, Sisms, spoke at length about the negotiations to date and about Respondent's unfair labor practices. He protested strongly the distribution of the above letter that afternoon and he went down the letter and made numerous comments concerning its contents. Sisms related what bargaining there had been about the subjects mentioned in the letter. He told what the Company had granted in other plants on the various subjects. He told how the Company's wage proposal related to the new Federal minimum wage. He said the company proposals were a mixture of the Company's present practices plus "things which [Respondent] had told the nonunion employees they were going to get or had already gotten in other plants." He asked the employees if they were in favor of the Company's proposal and they rejected it unanimously. He reviewed the increase at Lonoke particularly and referred to the original unfair labor practice charge the Union had filed against Respondent concerning that raise. This original charge had been filed September 1, 1966. 170 NLRB No. 183. Sisms stated that the Company was not bargaining in good faith with the Union. He reviewed the bargaining, and told about the negotiation sessions in St. Louis and New York when the Union had the employees' committee present and the Union was hoping an agreement could be reached.

After Siems spoke, Attorney Youngdahl also spoke about the negotiations and about the company letter, and read a resolution he drafted. An employee moved that it be adopted. Many people seconded it, and it was adopted unanimously. The resolution read as follows:

> Resolved—
>
> That because of the unfair labor practices of Ottenheimer Brothers, beginning in Little Rock and continuing to this day both here and in Lonoke, we give our committee power to call a strike against the company until Ottenheimer lives up to its legal and moral duties to treat us like human beings.

8. Last Session Before the Strike.

The scheduled October 24 negotiation session started at 11 a.m. and lasted no more than an hour. Its commencement was delayed somewhat while Siems talked with the employees' committee. A Federal mediator was present but the record does not show which side, if either, invited him.

The session opened with a dispute as to which side called the meeting.

Early in the meeting, according to the credited testimony of Youngdahl, Kullman said the Union has indicated it wanted the Company's last proposal submitted to the committee. Siems disputed this. The record fails to show when, by whom and to whom, any such request was made, and the record gives every evidence that the Union was able to take care of its own relations with the employees and the employees' committee. Keeline's testimony is credited to the effect that Kullman said the Company's presence at the meeting was to explain its proposal to the committee.

Siems bitterly protested the Company's distribution of its October 18 letter to employees quoted above. He accused

Respondent of bad-faith bargaining in presenting its proposal directly to the employees in this letter. He objected to Respondent's failure to send a copy of this letter to the Union. He objected to Respondent's urging the employees to insist on democratic procedures in the Union, which Siems stated were completely democratic. Siems told Kullman he could say what he wanted to the committee but that it might be a waste of time because the Company's last proposal had been voted on twice; that the committee knew the Company's offer and had rejected it; and that the people had taken a strike vote. He repeated several times that the people will decide, the people will decide.

Both Youngdahl for the General Counsel and Keeline for Respondent testified that Kullman called Siems a liar first and that Siems answered that Kullman was a liar. They differed on the subject that produced this exchange. Youngdahl credibly testified that Kullman had incorrectly stated Stulberg's money offer in New York, that Kullman had said the "10, 10, 10" offer meant something different than all understood it meant at the conclusion of the New York meeting. Presumably Kullman stated what had been Respondent's alleged understanding of the "10, 10, 10" at the beginning of the New York meeting, although Kullman knew this was an erroneous understanding by the end of the New York meeting and certainly at the October 24 meeting when he repeated the error. Siems corrected him. On the entire record, I find that it was at this point that Kullman called Siems a liar. During the discussion, Siems asked Kullman if he was now offering "10, 10, 10," and Kullman replied in the negative. Kullman reviewed Respondent's offer as contained in Guthuns' October 18 letter. Kullman also accused the Union of deceiving the employees as to what transpired at the New York meeting; he said

the Company had made a proposal which the Union had accepted, but that the Union had deceived the employees about it. Kullman said the Union had not told the employees that the Union accepted all the Company's proposals except the money proposals, that the only disagreement was over the "10, 10, 10." Kullman said the Union is about to strike over 5 cents for two 6-month periods. This statement indicated that Kullman understood the difference between Stulberg's "10, 10, 10, 10" as explained at the New York meeting and Respondent's current offer. Siems told Kullman there would be no more meetings in the absence of the employees' committee, and that they were back to their original procedure of meeting with the committee. Keeline incredibly testified that Siems said there isn't any offer; and in the same breath, inconsistently, we are back to the original proposal. In modern parlance, the record did not show Siems to be that inconsistent a negotiator. To the contrary, it showed him consistently pressing towards his goal. Further, neither Keeline's notes, nor McClain's, recorded Siems as saying there was no offer on the table.

It was a turbulent meeting and it ended when the company negotiating team got up and walked out. As they did so, Kullman asked "what separate[s] us?" Siems replied, "the people and a decent offer from the Company." Kullman replied "I only hope the 1400 people know what separates us: A nickel for two 6-month periods."

Keeline testified that just before they walked out Kullman said that the Company's offer was on the table and the Company was waiting for the Union to come back with a counterproposal. The meeting ended without either party stating that the negotiations were at an impasse and without Respondent saying anything about putting a wage increase into effect.

At this meeting, Respondent's spokesman conducted himself more as though he was intentionally trying to aggravate the situation and force the employees to strike than as though he was trying to move forward to an accord with the Union. Thus, instead of moving forward Kullman went backwards, and, using figures he knew were erroneous, talked about the "agreement" in New York and called the Union's negotiator a liar. Kullman also accused the Union of deceiving employees as to what happened in New York. These abrasive tactics tended to goad the Union into a strike.

At this meeting Respondent said nothing about putting the 10-cent raise into effect.

9. Unilateral Wage Increase of October 25.

After this October 24 negotiation session, which ran from 11 a.m. until noon, Guthunz decided to grant the employees a 10-cent increase immediately, and Respondent's team drafted another letter to employees, dated that day, which letter was distributed to employees at work later that afternoon. The same Sears Roebuck man, Kullman, Guthunz, and Keeline collaborated in drafting this letter. It read as follows:

> TO OUR OTTENHEIMER EMPLOYEES REGARDING COMPANY PROPOSAL FOR A CONTRACT.
>
> This morning we met again with the Union Negotiating Committee. We met to see what proposal the Union had to make as a counter to our offer of October 6 which it had rejected—a proposal which would have brought your minimum rates to $1.70 an hour in October, 1968 with an immediate increase of $.10 an hour retroactive to August 1, 1966.

I think you should know before you get led out on strike just where the Company and the Union stand. In New York City where we met in open contract negotiations, Mr. Stulberg, International President of the I. L. G. W. U., made the following proposal:

> . . . A two year contract, effective upon signature, with an immediate $.10 an hour increase retroactive to August 1 as offered by the Company;
>
> . . . $.10 an hour increase on February 1, 1967 and $.10 an hour increase on February 1, 1968.
>
> . . . All other terms and conditions of the bargaining agreement to be as theretofore agreed by the parties or proposed in writing by the Company, including the Company's pension plan and revised health and welfare plan.

Mr. Stulberg further stated that a three (3) year contract could be had if the Company would agree to put into it a clause giving the Union the right to put up a picket line here at Little Rock any time it had a dispute with another Kellwood plant, say in West Virginia or in Arizona. This Union wanted the right to take *you away from your jobs and away from your paychecks* to put pressure upon the Company to settle a dispute in which you had no concern.

Now Mr. Siems will deny to you that such a proposal was made. He denied it in the meeting this morning, but I assure you it was made.

At that time, the Company's proposal was $.10 now with retroactivity, $.05 one year from the contract date and $.05 two years from the contract date on top of any change in the minimum wage law. We had originally understood the Union wanted $.10 now and $.10 on each anniversary date for a three (3) year contract. In New York, we said we would agree to this; however, Mr. Stulberg explained his proposal was as I have stated above. We agreed to take the Union's proposal home and consider it. Our offer, then, of October 6 was a

counterproposal to the Union's offer. Side by side then, here is where we stood at 10:00 A.M. this morning:

Company	Union
$.10 now retroactive to August 1.	$.10 now retroactive to August 1.
$1.45 an hour minimum on February 1, 1967.	$1.50 an hour on February 1, 1967.
$1.50 an hour minimum in October, 1967.	
$1.65 an hour minimum on February 1, 1968.	$1.70 an hour on February 1, 1968.
$1.70 an hour minimum in October, 1968.	

AT 11:00 A.M. THIS MORNING, THE UNION SAID IT HAD NO OFFER ON THE TABLE.

The Union says the Company can expect a strike. We don't doubt its ability to force one. We want to let you know that if a strike does take place, we are going to operate these plants. There will be jobs here for any who want to work, and we will seek replacements to fill vacancies. Because the Union has forced this impasse, we are going to immediately put into effect the $.10 an hour increase which we offered.

I hope each of you will seriously consider what you may be about to do—bearing in mind what I have said in this letter. I hope you will not continue to be misled by a union, which as I see it, is using you to further *its interests* throughout all of Kellwood rather than to protect *your interests* here at Little Rock.

Sincerely yours,

/s/

Respondent did not send a copy of this letter to the Union or notify it that it was going to put the 10-cent wage increase into effect. The Union learned of the letter late

that afternoon when employees delivered it copies of the letter. Respondent put the raise into effect on October 25.

To be noted is that there was no credible testimony, oral or written, to the effect that at the October 24 session the Union said it had no offer on the table. Youngdahl credibly testified that at no time during that meeting did the Union say it had no offer or proposal on the table; and Youngdahl pointed out that during the meeting Siems asked Respondent if it would accept the Union's "10, 10, 10" proposal.

10. Decision to Strike.

That evening, October 24, an employees' meeting was held, attended by some 200 to 300 employees. It had been scheduled as a meeting for the 20 member employee negotiating committee, but was opened up to others after distribution of the Guthunz letter that afternoon. I find the large attendance resulted from that letter. Siems and Youngdahl told the employees their version of the negotiating session that morning and spoke of Guthunz' letter just distributed announcing the wage increase. Siems and Youngdahl told the employees the Company was not bargaining in good faith, particularly concerning the wage increase. Siems and Youngdahl told the employees that if they decided to strike, the Union was behind them. Siems showed the employees a check from the Union for $100,000 and told them it would be deposited the following day to start a strike fund. There was a clear consensus to strike beginning the following morning. The meeting ended with a discussion about the mechanics of the strike, who would be picket captains, etc.

The strike began October 25, 1966, and lasted until November 22, 1967. A report on organizational drives dated January 13, 1967, to a meeting of the Union's general

executive board, January 30—February 3, 1967, read in part as follows:

> Since October 26 we have been chiefly concerned with the strike at the Kellwood plant in Little Rock, Arkansas. The ranks of the strikers has remained solid with only 10 having returned to work since the beginning in spite of injunctions, arrests and every kind of harassment brought against the strikers by the Company. This is the kind of determination that we rarely see.

The minutes of this meeting recorded that Vice President Siems stated that the morale of the strikers is excellent. A report on organizational drives to a meeting of the Union's general executive board, July 10-13, 1967, recorded that:

> The Kellwood strike in Little Rock, Arkansas, goes into its ninth month with over 600 active strikers, whose morale is as high as the day the strike was called. Their ranks are firm with only 12 of the original strikers having returned to work during this entire period.

At the close of the October 24 negotiating session between the Union and Respondent, no arrangements were made for a future meeting. At 8:08 p.m. that evening, Youngdahl gave Western Union a night letter addressed to the Company, reading as follows:

> As attorney for International Ladies Garment Workers Union, hereby protest unilateral wage increase announced by letter of October 24 without notice to Union. Because of this and continuing violations by Ottenheimer of legal obligation to bargain, Union calls strike beginning October 25. The negotiations are not at an impasse, and we are ready to meet and bargain at any time.

At about 1 p.m. October 25, Western Union reported to the Union that the night letter was "delivered 12:17 p.m. by phone because picket line and wouldn't answer phones." There was no proof that Respondent ever actually received this night letter and in any case Respondent never answered it.

G. *Conclusions Concerning Respondent's Bad Faith Bargaining up to the Strike.*

1. Respondent's overall design was to defeat all unions throughout Kellwood. Respondent's bargaining at Ottenheimer was not such as proved that Respondent had abandoned or was making an exception to its overall design and had undertaken, with an open mind and a sincere desire to reach an agreement, to bargain in good faith with the Union.

2. There was a "telling coincidence" between Respondent's prenegotiation policies, utterances, predictions, and statements of intentions, and Respondent's subsequent actions, as revealed in this record. Thus Respondent's policy was to grant only minimum benefits and to keep the Union out; in the negotiations it granted only minimum benefits and it eliminated the Union by replacing the strikers and then refusing to recognize the Union further. Thus, Respondent earlier indicated to the employees that it had no intent to sign a contract with the Union, and it never did. It earlier told the employees that Respondent did not have to and would not agree to the Union's demands and impliedly told them it would not reach an agreement with the Union and that a strike was inevitable; Respondent did not reach an agreement with the Union and a strike occurred. Respondent earlier sought to convince employees that the inevitable result of a strike would be a loss of their jobs by the employees; during the strike

Respondent replaced most of the strikers. *Cf. N. L. R. B. v. May Aluminum, Inc.*, 398 F. 2d 47 (C. A. 5, 1968), enfg. 160 NLRB 575.

3. In its pre-election campaign in late 1965 and early 1966, Respondent asked the employees how the Union was going to *make* the Company "do anything if it doesn't intend to pull a strike." After it was all over, so to speak, on December 22, 1967, Guthunz gloated to employees that although he had kept a promise made a year before, this was "more than I can say for another group"—an obvious reference to the Union's failure to obtain a satisfactory cont[r]act. These Company's statements disclosed Respondent's closed mind towards the Union and the practice and procedure of collective bargaining. Thus, Respondent's state of mind from the beginning was that it would yield through negotiations not enough to satisfy the Union and employees and would push them to use their ultimate weapon. Later, the Union having achieved no contract (through Respondent's intransigence), Guthunz gloated over the Union's ineffectiveness and impotency.

4. On the preponderance of the evidence in this entire record, I find it impossible to reconcile Respondent's vicious antiunion campaign with a simultaneous or later sincere desire to reach an accord with the Union. I find it impossible to believe on this record that the Company did not bargain with the intent of bringing about the result that occurred.

5. The Company's proposals and counterproposals on noneconomic subjects could have been made just as they were, and the negotiations gone just as they did, with the Company having no intent to explore in good faith the possibility of getting together with the Union on money matters and no intent to let the situation get to the point of a complete meeting of the minds on the major subject of

money. Respondent's bargaining concerning wages and rates, viewed against and in the light of Respondent's pre-election massive antiunion campaign and its corporate policies concerning unions and the negotiations, was the touchstone in this situation and proved that Respondent was bargaining in bad faith and had no intent to reach a final agreement with the Union.

6. As has been found above, the timing and manner of announcement of Respondent's wage increase to the Lonoke employees on July 18, 1966, was aimed in part at undercutting the authority and prestige of the Union in its representation of the Little Rock employees in the Little Rock negotiations; and revealed Respondent's rejection of the principle of collective bargaining and proved that Respondent was bargaining in bad faith at Little Rock.

7. Once the 1966 increase of 10 cents had been set by the division presidents and Guthunz in early July 1966 for all of Kellwood, Respondent was never willing to change this amount. It had a fixed purpose to carry out the corporate decision and not to bargain concerning it. Its mind became hermetically sealed on this amount when it was set for all of Kellwood and thereafter it never bargained with the Union for the Little Rock employees with an open mind concerning the initial increase. Bargaining in good faith requires bargaining on *every* issue, especially with a *newly certified* union on a *first* wage increase. Respondent offered this increase to the Union on July 18 and 19. On August 18 Siems told Keeline he needed a first raise of 20 cents, and on August 29, Siems asked for a first raise of 15 cents. On the latter date, Kullman announced that Respondent would not go above a dime for the first raise (although the amount of the second raise was negotiable). Respondent never did. President Guthunz admitted that even if the Union had demonstrated that Respondent could have increased the amount of the first

raise, he would not have raised it. Respondent never offered the Union any *reasons* or any reasoned argument for this and its earlier lower wage offer. When on July 19 the question arose, Kullman told Siems that Respondent was not claiming inability to pay more, that "we are not going to discuss what Kellwood can or cannot pay." Keeline quoted Kullman as saying at one session, "I am just telling you that this is all we're going to offer." At the St. Louis meeting, President Wenzel told the Union, according to the credited testimony of Youngdahl, that he would have to check with the executive committee of Kellwood before considering higher wages. Negotiating with an hermetically sealed mind on this initial wage increase, and being willing to bargain only on its own terms, was further evidence that Respondent was bargaining in bad faith.

8. Once the 10-cent increase had been put into effect Kellwood-wide without credit to any union, Respondent's prime motivation thereafter was to put the same 10-cent raise into effect at Little Rock without credit to the Union, rather than to negotiate a first raise with the Union. Thus, upon the high-up decision of Wenzel and Guthunz, on August 29 Kullman told Siems the negotiations were "holding up" the raise to the Ottenheimer employees which had been received by all other Kellwood employees and that Respondent wanted to put it into effect September 30 retroactive to August 1. A month later in New York, instead of trying to present its new wage offer to the Union (the one it presented October 6), Respondent through Kullman told the Union it reserved the right to put the first 10 cents into effect. On the same occasion, Respondent used its alleged misunderstanding of Stulberg's wage proposal to foul up and obstruct the bargaining process. On October 18, Guthunz wrote the employees that Respondent would put the 10-cent raise into effect retroactive to August 1, if the Union accepted Respondent's entire October 6 offer by

October 28. In this letter, Respondent undertook to undermine the Union and to establish for its own bad-faith purposes when an impasse would occur. Having in this letter impliedly given the Union until October 28 to accept its offer before an impasse would possibly arise, Respondent then reneged on its implied offer and put the raise into effect October 25. Finally, after negotiating abrasively that day, on October 24 Respondent wrote the employees that the Company was going to put the 10-cent-an-hour increase into effect immediately; and it did so without notifying the Union of its intent or its action. This had the foreseeable and intended result of undermining the Union in its efforts to get an acceptable contract for the employees without a strike.

9. This unilateral wage increase was announced in late afternoon prior to the evening meeting of employees on October 24 when the final decision to strike was made. The employees' committee had had authority from the employees since October 18 to call a strike but had not called it. The committee's evening meeting, October 24, expanded into an employees' meeting of several hundred after the Company's unilateral act. It must be concluded on this record that Respondent's unilateral act contributed to the swelling of this meeting and to the final decision to strike reached at this meeting.

10. As is seen below in this Decision, the Union had been building up to a strike for some weeks prior to October 24, which Guthunz knew from reading the Union's leaflets which reached his desk. The record proved that Guthunz kept himself closely informed concerning the negotiations and the Union's activities. Guthunz knew, and his skilled labor practitioner, Kullman, knew, that committing this unilateral act rather than continuing to bargain with the Union would be the final act that would force the employees and the Union to undertake the strike. They also knew

Siems would react strongly against this announcement by letter, for he had so reacted only that morning against Guthunz' October 18 letter. It cannot be known for sure whether the employees would have decided to strike on the evening of October 24 but for Respondent's unilateral act and its October 24 letter, because the unilateral act and the letter intervened prior to the meeting. It follows, and I conclude, that by announcing as it did the 10-cent wage increase on October 24 and putting it into effect immediately, unilaterally without informing the Union, Respondent intentionally forced the Union and employees to strike, intentionally "place[d] the odium of rupture" upon the Union. See *N. L. R. B.* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), cert. denied 304 U. S. 576; *N. L. R. B.* v. *Reed & Prince Manufacturing Company*, 118 F. 2d 874, 883 (C. A. 1).

11. Respondent offered no credible reason or explanation for its unilateral action or its October 24 letter. Guthunz' testimony was simply that he felt the negotiations were at an impasse "and that we should put in the increase"—even though as his testimony revealed he knew it would "aggravate" the Union. The preponderance of the evidence, viewed in the light of Respondent's pre-election antiunion campaign, and the hostility shown therein leads to the conclusion, which I reach, that Respondent's purpose was to force the strike, to weaken the Union's position as bargaining agent by showing employees they didn't need the Union to get a raise, to induce employees not to join the strike, to increase Respondent's capacity to attract strike replacements, and ultimately to replace strikers with nonunion replacements.

12. My final conclusions are that after the 1966 wage increase was set at 10 cents for all of Kellwood at the division president's meeting in early July, Respondent went beyond the bounds of hard bargaining and never thereafter

bargained in good faith with the Union, as shown by: its July 18 announcement at Loneke; its negotiating thereafter with an hermetically sealed mind and only on its own terms as to a first raise, its motivation and effort thereafter to put the raise into effect rather than negotiate it with the Union; its final unilateral act of granting the raise to force the strike, to weaken the Union as bargaining agent, to induce employees not to join the strike, to increase Respondent's capacity to attract strike replacements, and to replace strikers with nonunion replacements. Upon these facts and conclusions, and upon the preponderance of the evidence in the entire record, I conclude that Respondent never intended to reach a contract with the Union, that Respondent has refused to bargain in good faith with the Union, that no good-faith impasse[26] was ever reached, that Respondent has violated Section 8(a)(5) of the Act, and that all of this was an important cause of the beginning and continuation of the strike.

13. In addition to the above, Respondent's proposal limiting the right to strike while it refused to grant the Union arbitration was additional proof that Respondent's conduct fell short of meeting its statutory obligation. The Supreme Court has said, "plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike." *Textile Workers Union of America, AFL-CIO* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 455. See also *"M" System, Inc., Mobile Home Division Mid-States Corporation*, 129 NLRB 527, 550; *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 578; *Winston-Salem Printing Pressmen and Assistants Union No. 318* v. *Piedmont Publishing Co.*, 67

26. Cf. *N. L. R. B.* v. *Herman Sausage Co., Inc.*, 275 F. 2d 229 (C. A. 5); *N. L. R. B.* v. *Andrew Jergens Co*, 175 F. 2d 130, 136 (C. A. 9), cert. denied 338 U. S. 827; *N. L. R. B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 136 (C. A. 1), cert. denied 346 U. S. 887; *Armstrong Cork Co.* v. *N. L. R. B.*, 211 F. 2d 843, 847 (C. A. 5).

LRRM 2939, 2942 (C. A. 4).[27] Here throughout the negotiations Respondent argued against and refused to include arbitration of grievances as a final step in the grievance procedure. Guthunz was willing to enter into an oral agreement with Siems, man to man, to arbitrate any grievance but wage rate grievances providing Siems would agree to arbitrate any item requested by Guthunz. This was not, of course, a written arbitration clause, but an oral arrangement between two men subject to their feelings of good faith in one another. It was referred to in the evidence as arbitration by "mutual consent." The fact that Guthunz was unwilling to put even this "limited arbitration" into writing showed that Respondent was unwilling to meet his statutory obligation. *Cf. H. J. Heinz Company* v. *N. L. R. B.*, 311 U. S. 514, affg. 110 F. 2d 843 (C. A. 6). Particularly was Respondent's unwillingness to put it in writing a violation of Section 8(a)(5) because on July 28, 1966, Kullman had written the Union (with reference to another issue) that "the Company's contention is that the contract should cover all matters subject to bargaining." While unwilling to enter into a binding written arbitration clause Respondent sought throughout the negotiations to limit the Union's statutory right to strike to such an extent that its effectiveness as an economic weapon was lost. Thus Respondent's final proposal on Strikes and Lockouts presented in St. Louis on September 22, 1966, provided in its final section:

> In the event a grievance should be filed by either party which the other party asserts is not subject to consideration under the grievance procedure, the refusal to arbitrate such grievance shall not be considered as

27. It is clear that the policy is generally accepted by the parties to collective-bargaining relationships. As of August 1965, "Ninety-six percent of contracts provide for arbitration of grievances not settled by the parties themselves." Bureau of National Affairs, Collective Bargaining Negotiations and Contracts, 51:6.

> permitting action in accordance with the provisions of this Section 10 [as permitting a strike] unless and until a court of competent jurisdiction has determined that the particular grievance is a grievance within the meaning of Article XXVIII hereof, and following such determination there has been a refusal to arbitrate.

At that time, and for most of the negotiations, in the several proposals upon grievance procedure, "grievance" was defined to mean "any dispute, complaint, or controversy, as to the interpretation or compliance with this Agreement," or "any dispute, complaint, controversy, or claim over the discipline or discharge of employees and as to the interpretation or compliance with the specific provisions of this Agreement." Thus, despite these simple definitions, not difficult of interpretation, Respondent could forestall a threatened strike over a grievance by *merely asserting* that the grievance was "not subject to consideration under the grievance procedure." This mere assertion would hold up the strike pending a court adjudication with all of its attendant loss of time and consequent impotency of the Union in the eyes of its members. Further, although this last company proposal allowed the Union to strike over unsettled grievances, it provided that during such a strike the contract would be suspended.

Thus, Respondent would give the Union neither binding written arbitration nor an effective right to strike. Under all the circumstances of this case, this was further proof that Respondent was not bargaining in good faith with the Union. See Reel, *The Duty to Bargain and the Right to Strike*, 29 Geo. Wash. L. Rev., No. 2, Dec. 1962, National Labor Relations Board Symposium Issue.

H. *Respondent's Pre-election Campaign Was in Violation of the Act.*

The settlement agreement in Case 26-CA-2313 was executed by Respondent and the Union on June 14, 1966, and was approved by the Regional Director on behalf of the Board's General Counsel, on June 16, 1966. The settlement agreement provided, *inter alia*, by reference to a notice Respondent was to comply with, that Respondent would not:

> In any other manner interfere with or restrain our employees in the exercise of their rights to self-organization . . . to bargain collectively through representatives of their own choosing. . . .

Respondent violated this agreement by bargaining in bad faith, by unilateral activity, and in the other ways found above to have indicated bad faith. Respondent having violated the settlement agreement and committed unfair labor practices thereafter, as found above, I find and hold that the Regional Director properly vacated and set aside the settlement agreement insofar as it related to Section 8(a)(1) conduct. It therefore becomes incumbent upon me to pass upon whether that conduct violated Section 8(a)(1) of the Act. Upon consideration I find that it did.

1. Respondent's repeated efforts to frighten employees away from the Union and to defeat the Union at the election, by talk of a strike when there was no serious consideration among employees or union organizers of striking the plant, was a violation of Section 8(a)(1) of the Act. *Hoffman-Taff, Inc.*, 135 NLRB 1319, 1321; *Orkin Exterminating Company of Florida, Inc.*, 152 NLRB 83, enfd. 379 F. 2d 972 (C. A. 5), 65 LRRM 2813.

2. Respondent's efforts to convince employees of the futility of their joining, supporting, and voting for the Union were violations of Section 8(a)(1).

3. Respondent's repeated threats that Union and strikes go together, that a strike was inevitable if the Union won the election, and that in a strike the employees might lose their jobs were implied threats of economic loss to employees in further violation of Section 8(a)(1).

4. By denigrating the Union with such statements as "the union is nothing but a parasite;" and, "like a leach, they want to hang on and take part of your earnings with their dues, fees, and assessments;" and, "this union mess;" and "everybody loses in a strike except the union. The union loses nothing because the union has nothing at stake;" and that the Union was trying so hard to get into Ottenheimer's "because the union is after your money;" Respondent further violated the employees' Section 7 rights and Section 8(a)(1).

5. By repeatedly telling employees that Respondent did not have to reach an agreement with the Union, that it could say *no* to union demands, that Respondent is not going to sign a contract which is not in the best interest of the employees and the Company (it being implied that Respondent, not Respondent and the Union, would decide what was in the best interest), that the *only* thing the Union could do would be to call a strike, with dire consequences to the employees, Respondent impliedly threatened employees that it would not negotiate and sign a contract with the Union, thus repudiating the practice and procedure of collective bargaining in further violation of Section 8(a)(1).

6. The interrogations concerning and interference with employees' Section 7 rights by minor supervisors, the permitting of antiunion petitions on the work line during work time, and the passing of antiunion leaflets on the work line during working time by one supervisor were further violations of Section 8(a)(1) by Respondent.

7. Under all the circumstances of this proceeding, I

hold that by the showing of the film "And Women Must Weep" following the introduction by which Respondent presented it, Respondent further violated Section 8(a)(1) of Act.

I. Strike Was an Unfair Labor Practice Strike.

Although an important cause of the strike was the Union's desire on behalf of the employees to try to wrest greater economic concessions from Respondent, the record proves overwhelmingly that Respondent's unfair labor practices were also an important contributory cause of the beginning of and the prolongation of the strike.

As has been found above, during the pre-election campaign there was no serious talk among employees or union organizers of striking the plant, despite Respondent's massive antiunion campaign. Guthunz later told the employees, mostly replacements, that "the Union told our employees there would be no strike, no trouble, and that there was nothing for them to worry about." This was the Union's position despite Respondent's hostile campaign against it, because the Union desired a contract, not a strike. Nevertheless, the Union never forgot, as Unions do not, Respondent's vicious campaign, which unquestionably was a contributory cause of the strike. Particularly in this situation, where the Union's principal organizer and principal negotiator, Siems, was also vice president of the International Union, would the Union not forget all that had gone before.

During the negotiations prior to July 18, the Union's bargaining and its leaflets to employees show that it was concentrating upon trying to get a collective agreement with Respondent that would improve the wages and working conditions of the employees, and was not promoting a strike.

As has been found above, Respondent's July 18 effort at Lonoke to undercut the Union in Little Rock and to obstruct the process of bargaining in Little Rock was an important cause of the strike. This act by Respondent had a profound effect upon Siems' assessment of what Respondent was up to and Siems' assessment had an important effect upon the employees' committee and the employees. Siems' immediate reaction was "foul play" and he never thereafter forgot it or let the employees forget it, although the Union tried to bargain with Respondent for 3 more months before permitting strike talk to gain the upper hand among employees. Siems referred to this Lonoke episode in his talk to the employees prior to the strike vote on October 18, and it was referred to in the strike resolution. Of note in this connection is an alleged quotation from an "old timer" which appeared in a union newsletter dated July 27, 1966:

> "Well, at least they've offered us something. I've been working there (Ottenheimer's) almost 18 years, and this is the first time I've ever known them to say they'll guarantee to pay us operators one penny more than the law made them pay. 10 cents an hour isn't enough, but at least its more than they've ever done before."

To this was added the following:

> (NOTE: YES, 10 CENTS AN HOUR IS MORE THAN THEY'VE EVER OFFERED BEFORE! BUT, AS YOU KNOW, IT'S NO MORE THAN THEY'VE ANNOUNCED THEY'RE GOING TO GIVE THE WORKERS AT THE LONOKE SHOP—WHERE THEY'RE TRYING TO KEEP THEM FROM JOINING WITH YOU IN THE UNION.)

Respondent's unfair bargaining concerning wages, generally and specifically as found above, was an important cause of the strike, as was its general lack of good-faith

bargaining. As a result of Respondent's hostility shown in its pre-election campaign, Siems and Youngdahl were ever alert to the possibility that Respondent would not bargain in good faith, and Siems' spontaneous reaction to Respondent's July 18 announcement at Lonoke showed what a deep impression it made on him.

Respondent's recurrent efforts to undermine the Union's bargaining position, shown throughout this Decision, were important causes of the strike, including not only the Guthunz-McKibben speech of July 18, but also Guthunz' letters of October 18 and 24 to employees, the unilateral wage increase of October 25, and Respondent's bargaining tactics at the September 29, and October 24 meetings. Of note in this connection was President Stulberg's remark at the end of the New York session on September 29 that if Respondent put the first 10-cent raise into effect, "we will start from there." Unilateral activity had been outlawed for many years, as both sides well knew.

Union leaflets prior to the strike show that Respondent's unfair labor practices were an important cause of the strike.

A leaflet of September 2 said:

> *No* Strike *Today* just a demonstration. . . . *Today* there is *only* a before work demonstration by members of your Union Organizing and Negotiating Committee. . . . *Today—you see us demonstrating—*
>
> • • • • •
>
> *To protest* the Unfair Labor Practices the Company continues to engage in.

A union action bulletin of October 19, 1966, referring to the strike vote meeting the night before, stated:

> A great throng of Ottenheimer employees overflowed a big meeting hall and adjoining rooms last night to register a resounding protest against the unfair labor practices of the Kellwood (Ottenheimer) Company and demand that the Company agree to better Union Contract terms or face a strike by its employees.

A union action bulletin of October 21 referred to crowds of union committee members again overflowing meeting rooms volunteering for strike service as plans moved rapidly ahead for a strike at any time. The bulletin said it is clear that the Ottenheimer employees are saying:

> We've had enough!—of Unfair Labor Practices of the Ottenheimer Company which violate U. S. Law.

A union strike report of October 28 referred to the Union's campaign underway to let the country know "the sad facts of the Company's unfair labor practices, low wages, bad treatment and the shocking affronts to human dignity which brought about the strike here."

Another union strike report, dated November 4, 1966, stated that "it is only a matter of time until the Company must decide to quit committing unfair labor practices and come to proper terms with you and your Union." It also referred to handbills being issued, to tell the country "the facts about the unfair labor practices, low wages and bad treatment that made it necessary for Kellwood workers to come out on strike in Little Rock."

A strike report of November 10 stated that regular strike victory meetings would be held twice a week "until the Company comes to its senses, quits committing unfair labor practices and settles the strike."

The picket signs carried by the pickets from the beginning of the strike also referred to the Company's unfair labor practices. Until March or April 1967 the picket signs read, "Ottenheimer employees on strike against unfair labor practices," followed by the initials of the Union; some additional signs had other legends, referring to being on strike against "years of bad treatment" and for "human dignity." The only legend on the picket signs carried from April 1, 1967, to the end of the strike was, "Kellwood employees on strike against unfair labor practices" followed by the initials of the Union.

Although Siems and Youngdahl were unable to spell out to employees precisely what *all* the unfair labor practices consisted of, they sensed that unfair labor practices were being committed by Respondent and conveyed this conviction to the employees prior to the strike vote of October 18 and the consensus to strike on October 24.

Although the pre-election unfair labor practices may at first blush seem remote as a cause for the strike, the Board's experience shows that unions and employees do not treat lightly or easily forget or readily forgive such a hostile massive antiunion campaign as the employees were subjected to in this instance. The strike resolution passed on October 18 specifically referred to the pre-election unfair labor practices in the words:

> . . . unfair labor practices . . . beginning in Little Rock. . . .

Since one of the reasons for the strike was to protest Respondent's unfair labor practices at Little Rock before the election and during the negotiations, and at Lonoke, the strike was an unfair labor practice strike from its inception even though other reasons were also present. *N. L. R. B.* v. *West Coast Casket Company, Inc.*, 205 F. 2d 902, 907 (C. A. 9). See also *Fitzgerald Mills Corp.* v. *N. L. R. B.*, 313 F. 2d 260, 269 (C. A. 2), and cases cited, *N. L. R. B.* v. *Southland Cork Co.*, 342 F. 2d 702, 707-708 (C. A. 4); *N. L. R. B.* v. *Stilley Plywood Company, Inc.*, 199 F. 2d 319, 320-321 (C. A. 4), cert. denied 344 U. S. 933; *The Little Rock Downtowner, Inc.*, 145 NLRB 1286, 1312, enfd. 341 F. 2d 1920 (C. A. 8), 58 LRRM 2510. It is well established that Respondent is under a legal duty to reinstate unfair labor practice strikers upon their unconditional request, even if to do so requires the discharge of striker replacements, *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 278.

J. Striker Replacement Issue, Unilateral Wage Increase of February 1, 1967, and Vote of Strikers to Continue Strike.

On November 30, 1966, Kullman sent Youngdahl a telegram reading as follows:

> On behalf of Kellwood Corporation this is to inform you as attorney and bargaining representative for the ILGWU that in any future bargaining negotiations Kellwood will have to give consideration to the changed conditions resulting from the strike called by the ILGWU. Kellwood's contract proposals were made in anticipation of reaching a settlement with the Union without having to undergo the expense and disruption of its business resulting from a strike. In view of the fact that a strike has occurred Kellwood will want to give reconsideration to certain of its proposals and in particular will have to reconsider the seniority provisions of any bargaining agreement to be reached in the future so as to provide adequate protection for the replacements which have been hired for striking employees. Kellwood reserves the right in any future bargaining negotiations to submit such new or changed proposals as it deems advisable.

For the first time in the negotiations this telegram raised the striker replacement issue. On December 2, Guthunz had copies of this telegram posted on the company bulletin boards. He testified he did so so that the replacements would know the Company would protect them.

By letter dated December 13, 1966, the Union made the following requests:

> This is to request a current list of your employees, their job classifications and rates of pay, including particularly any pay increases or benefit alterations since the last information of this kind which you supplied to us, and with particular reference to the "replacements" to which Mr. Kullman referred in his telegram of November 30, 1966.

In answer Kullman wrote Youngdahl on December 21, 1966:

> The only changes in wage rates which have been made involved those arising out of putting into effect the 10 cents an hour increase which was announced on October 24, 1966. We cannot see where your request for a list of current employees has any relevancy to any bargaining issue and hence decline to furnish the same. On the contrary, it would appear, obviously, that such a list is only sought for the purpose of furthering the strike activities of the ILGW Union.

On January 20, 1967, Kullman wrote Youngdahl as follows:

> If you will recall, Ottenheimer has heretofore proposed a minimum guaranteed rate of $1.45 an hour effective as of February 1, 1967, and has also proposed increases in the rate ranges of various hourly employees with the exception of certain employees whose individual rates were already in excess of the maximum of the rate range of their classification.
>
> I am told that at the last meeting which Mr. Guthunz and Mr. Keeline had with you and Mr. Siems, the latter wanted to know whether or not the February increase could not be effective on an across the board basis to all hourly paid employees and Mr. Guthunz said that this would present no problem.
>
> At the bargaining meeting presently scheduled for next Tuesday, the Company will propose that these rate increases be put into effect as of February 1, 1967 in accordance with its prior offer to the Union.
>
> I am writing you this letter so that the Union may be giving consideration to the matter prior to the meeting.

The next negotiation session, the one referred to in Kullman's above letter, took place on January 24, 1967. Youngdahl credibly testified that he had been in regular touch with the Federal mediator in Little Rock, and also

had talked with the Federal mediator in St. Louis. He also talked with the head of the Mediation Service of Arkansas.

The January 24, 1967, session was held in the conference room of the Federal Mediation and Conciliation Service in Little Rock, with two mediators present, one from Little Rock and one from St. Louis. The meeting opened with a mediator asking the Company to state its position about the current issues in the negotiations. Kullman said any such statement would be premature because the parties disagreed on what had previously been agreed upon. Kullman said there were two additional problems. Firstly, Kullman said that there were 1,250 in the bargaining unit at the beginning of the strike, and that 900 had been replaced. He said that a procedure would have to be worked out for filling the 300—350 vacancies. Secondly, according to the testimony of both Youngdahl and Keeline, Kullman said that in earlier negotiations the Company had proposed a raise on February 1, 1967, to $1.45 an hour and that on that date the Company *was going* to give every employee a guaranteed 10-cent-an-hour raise. The Union said 5 cents above the Federal minimum for two-6-month periods was not enough.

During the meeting the Union asked Respondent not to put this wage increase into effect until there was an agreement with the Union covering it. Youngdahl repeated that he wanted it specifically understood that the Union was asking Kullman not to put the increase into effect "until we had an agreement."

A mediator and Kullman went down the list of 17 issues remaining as of the beginning of the St. Louis meeting on September 22, 1966. This discussion brought out the lack of agreement on numerous issues that had been passed over or glossed over at the New York meeting on September 29, and that Respondent wished to make changes in some of the

clauses previously tentatively agreed upon. Still in dispute was whether Respondent would agree not to discriminate against employees because of "age." Respondent had long taken the position that it did not intend to discriminate but would not put it in writing. Although after discussions for months the parties had in St. Louis finally agreed on 60 days for the probationary period for new employees, Kullman said the Company now wished to go back from 60 to 90 days. Kullman offered no credible substantive reason for this backwards move, and I find it was to obstruct the negotiations. The question as to whether the Union could challenge present piece rates or only future ones was still in dispute. Kullman said the agreed-upon language was insufficient to cover the Company's engineering program which was about to start and he wanted to add appropriate language. Kullman wanted also to make some language changes in the clause relating to "assignment to other work" and in several other clauses, including arbitration. Respondent had always refused arbitration as a final step in the grievance procedure but had verbally agreed to arbitrate by mutual agreement. Kullman now said that Respondent wanted a method for the selection of the arbitrator and wanted to spell out limitations on the arbitrator's authority. Kullman said the gentlemen's agreement between Guthunz and Siems to arbitrate items other than wage rates was at an end, that it had been "reached on certain assumptions which, so far as the company is concerned, no longer have any validity," and that any agreement on arbitration would have to be entirely in writing.

Youngdahl then stated the Union's position concerning the 17 issues. Youngdahl rejected the changes suggested by Kullman in a number of them, on the ground that the changes were more restrictive than the prior tentative agreements on those items.

On wages Youngdahl told Kullman the Union would

settle for the cheapest wages in Arkansas in any ILGWU shop performing comparable work. The Union identified "Bobbie Brooks" and "Jonathan Logan" as being such shops, and after discussion, agreed to supply the Company with copies of the wage structures at these two companies.

Several times during the meeting, the Union requested of Respondent the information first requested in Youngdahl's letter to Kullman on December 13, 1966, and particularly the names of the replacements. The Union said it needed the information in order to evaluate its positions on the replacements and that the Union needed to know the number and classification of employees who had been replaced. Both Keeline and Respondent's personnel manager, McClain, testified that Kullman replied that Respondent refused the names and addresses because they were not relevant to any bargaining purpose or need. Kullman said nothing about refusing the information because of any violence on the picket line or violence connected with the strike.

The day after this meeting, on January 25, 1967, Youngdahl wrote Kullman his resume of the meeting. In this letter, Youngdahl said concerning Respondent's proposed February 1 wage increase:

> . . . we categorically refuse to agree to such unilateral action, and ask you to withhold any wage increases in excess of the legal minimums until we have come to agreement.

In this letter, Youngdahl told Kullman that "we are available for negotiations at your convenience."

By letter dated January 25, 1967, from Guthunz to all non-striking and striking Ottenheimer employees, Respondent announced it was placing into effect a 10-cent wage increase on February 1, 1967. Guthunz said:

> . . . at the present time, we have in excess of 900 em-

> ployees at work in the plant exclusive of office, clerical and supervisory employees. On the day of the strike, we had approximately 1250 employees in similar job classifications. We are continuing with our replacement efforts so as to bring our work force up to its full quota within a relatively short period of time. There are accordingly approximately 350 vacancies available as of today for strikers or new hires. At the same time, we advised the Union that if the strike were settled, some agreement would have to be reached with respect to the taking back of striking employees, inasmuch as the Company would not, of course, let its present employees go simply to make places available for strikers.

By letter dated January 26, 1967, answering Youngdahl's letter of January 25, Kullman stated, among other things:

> It is the company's position that the contract should contain the entire agreement between the parties and nothing should be left to any unsigned side letters which for all the company knows may never have been communicated by Mr. Siems or you to your bargaining group.

On February 1, 1967, Respondent placed into effect the 10-cent wage increase for all but a handful of employees, and on or about the same date placed a 10-cent wage increase into effect Kellwoodwide at all other Kellwood plants. Five cents of this raise was required to bring Respondent's minimum up to the new Federal minimum. The additional 5 cents was voluntarily granted by the Company.

On February 3, 1967, Kullman supplied the Union with a list of the rate ranges of various job classifications. Before sending this letter, Kullman informed Guthunz that the General Counsel of the Board was going to issue a complaint against Respondent for refusing the information earlier requested by Youngdahl. The General Counsel issued the complaint in Case 26-CA-2641 on February 3.

By letter dated February 6, 1967, the Union supplied Respondent with appropriate excerpts from the Union's contracts in Arkansas with Bobbie Brooks and Jonathan Logan, which had been promised on January 24. Youngdahl concluded this letter:

> If there is a serious possibility of your agreeing to our proposal in this regard, we would be glad to supply you additional details. I look forward to your response.

On February 11, 1967, Kullman replied to the above letter as follows:

> As I read the excerpts from the schedules attached to your letter of February 6, the minimum piece workers rate at Bobbie Brooks is presently $1.75 per hour, and, after 2 months, the minimum piece workers rate in the sewing department at Jonathan Logan is now $1.80 per hour. As you point out in your letter and as Mr. Siems has heretofore informed us, the ILGWU would only be willing to negotiate a contract with the Ottenheimer Division of the Kellwood Company at rates equivalent to the minimum rates which might be found in either the Bobbie Brooks or the Jonathan Logan contracts. There exists, in my opinion, no serious possibility of my client agreeing to a present minimum for piece workers of $1.75 per hour.

On February 15, 1967, Respondent filed its original answer in Case 26-CA-2641. This was a general denial, but it did not plead an affirmative defense, such as that it refused any of the requested information because of picket line violence. On the same day, Respondent sent the Union a copy of a weekly payroll report with the names of the employees removed. Respondent never sent the Union the names of the replacements.

At a strikers' meeting on February 22, 1967 attended by "no less than 500," a resolution was passed reading as follows:

WHEREAS, the Ottenheimer Division of Kellwood Company has continued to violate the National Labor Relations Act in Little Rock and Lonoke, Arkansas and

WHEREAS, the Kellwood Company throughout the country has continued to fight the rights of its workers to organize collectively in many illegal ways,[28] and

WHEREAS, the refusal of the employer to tell the Union about the details of its demand that non-strikers be kept as permanent replacements of the strikers has made it impossible for us to know what might happen when the strike is ended or to appeal to the non-strikers to join our important effort, and

WHEREAS, the wage and benefit increases to non-strikers have undercut our bargaining and amounted in many cases to more than what the employer offered the Union during bargaining, and

WHEREAS, the entire course of conduct of the employer during negotiations has violated the good faith required by the law,

NOW THEREFORE BE IT RESOLVED, that the strike against the Company continue until these violations of the law are remedied and the employer bargains in good faith for a decent contract.

Prior to its passage, Youngdahl read this resolution to the strikers and explained its language. He talked about the wage increase at Lonoke, some of the things that happened at Kellwood's Alamo plant (see 170 NLRB No. 184). He said that the Union had asked for information from the Company which the Union considered vital and which the Company had refused, such as the names of replacements; he said the Union would need to know who the replacements were in order to be able to contact them and to try to give them the Union's side of the story.

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28. The Board has found violations in three divisions of Kellwood Company, based upon events occurring prior to February 22, 1967, when this resolution was passed. 166 NLRB No. 20, 170 NLRB No. 183, 170 NLRB No. 184.

1. Conclusions Concerning Refusal of Names.

The law is well settled that an employer is under a statutory obligation to furnish its employees' bargaining representative with information which is reasonably necessary or essential to intelligent bargaining. See *N. L. R. B.* v. *Truitt Mfg. Co.*, 351 U. S. 149; *J. I. Case Company* v. *N. L. R. B.*, 253 F. 2d 149, 152-153 (C. A. 7), and cases cited.

Here, after Respondent itself had raised the "replacement issue" and had indicated it would seek to protect the replacements, the Union reasonably needed to know whether Respondent was protecting the replacements by giving them increases or benefits which were detrimental to the strikers. The Union reasonably needed this information in order to be able to proceed with intelligent bargaining and in good faith it requested it. The Union's request for a "current list of employees, their job classifications and rates of pay, including particularly any pay increases or benefit alterations since the last information of this kind which you supplied to us [which was the previous summer] and with particular reference to the 'replacements'" was certainly a request for information relevant to the bargaining issue of whether Respondent was giving special or favored treatment to the replacements to the detriment of the strikers. (See *N. L. R. B.* v. *Erie Resistor Corp., et al.*, 373 U. S. 221.) Although Respondent gave the Union, piecemeal, some of the information requested, the Union's representative, Lambert, who analyzed the material, credibly testified that in the absene of the names of the current employees (which Respondent never gave the Union) he could not determine whether a wage increase had been given which the Union had not been informed of. At this stage in the bargaining, in view of all that had gone before, the Union was entitled to actual payroll information, including names, with which it could

satisfy itself for future intelligent bargaining purposes, as to the accuracy of Kullman's statement in his December 21 letter that "the only changes in wage rates which have been made involve those arising out of putting into effect the 10 cents an hour increase which was announced on October 24, 1966." Of note in this regard is that the testimony of Respondent's witness, Shaddox, showed that no accurate determination could be made as to what an employee's pay included from the records furnished the Union, that wage increases could be hidden in the payroll data, and that one way of checking the accuracy of the information would be to question particular employees about the information furnished. To do this, the Union would have to have the names of the replacements.[29]

Respondent defended on the ground that it withheld the names of the replacements in order to protect them from intimidation, bodily harm, property damage, and "night riding" which accompanied the strike. On the record this might well have been adequate defense if this had really been the reason for the withholding. No such reason was even given the Union, however. Guthunz testified that between October 25 and December 20, 1966, there was "night riding," which he understood to mean "terrorizing people in their homes." He admitted that he did not know whether any of the strikers had done the "night riding." In a Little Rock Newspaper within a week after October 25, Respondent offered a $2,500 reward, which it later increased to $7,500, presumably for information leading to identification of "night riders." No one ever claimed the reward. No representative of the Union, no picket or striker, was ever arrested according to Guthunz' knowledge, for "night riding." On December 20, 1966, a county court

29. Although the Union also wanted the names for other reasons for which the record may not sustain its entitlement to them, this fact does not negative the Union's right to them for the purposes found above.

enjoined the Union, Siems, two other organizers, and several employees from intimidating, molesting, mass picketing, "night riding," et cetera.

The Company never gave the Union any reason connected with violence, intimidation, property damage, or "night riding," et cetera as the cause for its refusal to furnish the names of the replacements to the Union. The nearest Respondent ever came to alluding to any such reason was Kullman's statement in his December 21 letter to Youngdahl that "such a list is only sought for the purpose of furthering the strike activities of the ILGW Union." Later, on January 24, Kullman asserted as the reason for refusal that the names and addresses were not relevant to any bargaining purpose or need. If violence, et cetera, was really the reason for withholding the names of the strikers, or if Respondent really feared retaliation against the replacements if their names were disclosed, no reason appears why Respondent did not so state clearly to the Union as the reason for the withholding. To be noted in this connection is that the names of many replacements were disclosed at the injunction proceeding on December 20, 1966, and even then Respondent did not give the Union the names of those replacements. Further, there was no showing of any retaliation against those whose names were disclosed, by strikers or the Union, between December 20 when the names were revealed, and January 24 when they were withheld, or ever.

Under all the circumstances of this proceeding, I hold that on December 21, 1966, Respondent withheld the names of the strike replacements, which were reasonably necessary to the Union for bargaining purposes, and then and thereafter gave the information it released to the Union in piecemeal fashion, in order further to impede the bargaining process and prolong the strike so as further to weaken the Union as the bargaining agent, its conduct being a

further violation of Section 8(a)(5) and (1) of the Act, and further evidence of its overall bad-faith bargaining with the Union.

2. Conclusions Concerning Unilateral Wage Increase of February 1, 1967.

When the February 1, 1967, 5-cent increase above the Federal minimum was announced on January 25, 1967, no good-faith impasse existed in the negotiations because, as I have found above, Respondent was never bargaining in good faith with the Union.

Assuming, however, contrary to the fact, that a good-faith impasse occurred just before the beginning of the strike, this impasse was broken by the strike and by Respondent's change of bargaining positions at the January 24 meeting. In his telegram of November 30, Kullman stated that in view of the strike Respondent wished to give "reconsideration to certain of its proposals." At the January 24 meeting, as has been seen, Respondent changed its position on probationary period, assignment to other work, and arbitration, among others. Also, there was discussion about the Union supplying Respondent with copies of the Bobbie Brooks and Jonathan Logan contract so that Respondent could understand the Union's proposal. Thus, there was indication of possible movement on a new approach to money matters. Further evidence that wages were still an open subject in the negotiations was the fact that on February 3 and 15, Respondent sent the Union some information concerning rate ranges and straight time pay for use in the negotiations. Also, on January 26, Kullman wrote Youngdahl, "should you have specific language which you want to submit in connection with the issues which you have left open, I will be happy to receive the same and comment thereon. . . . You have not yet then made your specific proposal with respect to holidays,

benefits funds or vacations." This language indicated that Respondent considered the negotiations to be fluid, not in a state of impasse, and that no impasse existed.

Simultaneously with this fluidity in the negotiations on other matters, Respondent employed its customary rigidity on pay raises. On October 24, Kullman stated Respondent's intent to put the 10-cent raise (5 cents above the required Federal minimum) into effect February 1. There was almost no discussion of the matter. The Union said 5 cents above the Federal minimum for two six-month periods was not enough, and adjured Respondent not to put the increases into effect until the Union and the Company achieved an overall contract on all subjects. The Union repeated this request in writing the following day. Respondent ignored the request.

Respondent put the 10-cent increase into effect on February 1, prior to receiving the requested information from the Union and while negotiations on wages and other subjects were still open. At the same time, or about the same time, the same raise was given to all Kellwood plants, nationwide, including Lonoke, all 20 of them. In the light of the monolithic way Kellwood planned and executed its August 1, 1966, nationwide raise, it is a fair inference, which I reach, that this time, also, Kellwood planned a nationwide raise sometime in advance and that Respondent offered it to the Union for the Little Rock plant with no open-minded intent to bargain about it but simply an intent to apprise the Union what it was going to do.

Upon the above facts and considerations, and upon the preponderance of the evidence in the entire record, I hold that Respondent's February 1, 1967, wage increase of 5 cents above the Federal minimum was instituted unilaterally in violation of Section 8(a)(5) and (1) of the Act, and that by this act, Respondent further showed its bad-faith bargaining with the Union.

3. Conclusions Concerning Continuation of the Strike.

The resolution passed by a large meeting of strikers on February 22, 1967, after Youngblut read it to them and explained its contents, specifically referred to Respondent's refusal of information and referred to "wage . . . increases to nonstrikers" and to Respondent's bad-faith bargaining. On this evidence and the entire record, I conclude that Respondent's refusal of the names of the replacements, its unilateral wage raise on February 1, 1967, and its continuing bad-faith bargaining with the Union, all unfair labor practices, prolonged the strike from February 22, 1967, onward, and that the strike continued thereafter until its end as an unfair labor practice strike.

K. *Direct, Coercive Pressure Upon Strikers to Return to Work.*

By letter dated March 27, 1967, from Guthrie to the strikers and nonstrikers, Respondent notified them that it was going to rebuild its work force to full capacity and giving strikers until April 5 to return to their jobs. Immediately thereafter, the Union sent a telegram to Guthrie protesting his unilateral dealing with the strikers and the coercive nature of his letter. Putting pressure on unfair labor practice strikers to return to work by a certain date was a further coercion upon employees in the exercise of their Section 7 rights and a further violation of the Act. Dealing directly with unfair labor practice strikers concerning their return to work was a further violation of Section 8(a)(1). *N. L. R. B.* v. *Bradley Washfountain Co.*, 192 F. 2d 144 (C. A. 7); *N. L. R. B.* v. *Montgomery Ward & Co.*, 133 F. 2d 676, 681-682 (C. A. 9); *N. L. R. B.* v. *DuBois Chemicals, Inc.*, 327 F. 2d 494 (C. A. 1), enfg. 140 NLRB 103, 116.

1. *Respondent's Bargaining on May 15 and July 21, 1967.*

Thereafter, the Company and the Union had two more meetings, one on May 15 and one on July 21, 1967, the latter under the auspices of the new officials of the Arkansas Department of Labor. Respondent's dealing with the Union at these two sessions and Kullman's correspondence with Youngdahl between May 15 and August 21, 1967, showed that Respondent was making no genuine effort to reconcile its differences with the Union, to work towards an accord. Rather, it dealt in a manner designed to frustrate, rather than promote, an agreement. Thus, Respondent refused to allow a union engineer in the plant with Respondent's engineer to study each operation, in connection with Respondent's re-engineering program, which on May 15 it announced it was starting soon, and which it actively commenced July 17. The information Respondent sent the Union concerning this program was unsatisfactory to the Union and Respondent refused to allow the union engineer to visit the plant to verify it. Respondent would permit its engineer to meet with the union engineer, but not in the presence of the employee committee. Later, it offered to permit its engineer to meet with Sierns and Youngdahl, with the understanding it was not to be a bargaining session. Thus, on July 21 when the Union abjectly offered to "start from the bottom," offering Respondent all clauses of the lowest contract terms in a comparable industry in Arkansas, Kullman said the Union's other contracts were no basis for negotiations because past sessions had developed changes applicable to Ottenheimer's plant in Little Rock. In almost the same breath, however, Kullman said that Respondent had completely replaced the strikers and that all proposals previously discussed would have to be viewed by the Company in the light of that situation; and that he saw no value in going back to the proposals of

October 1966 prior to the strike. He even objected to the Union's supplying the director of the Arkansas Mediation and Conciliation Service with proposed contract language developed during the prior negotiations. At this July 21 meeting, the Union pointed out that it was Respondent, not the Union, who was adding issues as the strike went on. Thereafter, by correspondence Kullman said "there will have to be a clear provision in the contract recognizing the Company's right to re-engineer plants or departments or craft operations within the plant *without negotiating with the Union;*" and also proposed a new section reading "each employee's seniority shall date from his most recent hire date." (Emphasis supplied.) Respondent knew that these clauses would not possibly be acceptable to the Union. Also, on July 21, Kullman agreed to give the Union in writing a list of issues added by Respondent during the strike and then to propose a further negotiation session. He supplied the list, and ended "I am sure that you and the other union representatives will appreciate the fact that the Company's proposals are not available for any period of indefinite duration." To this Youngblut replied,

> I am not sure exactly what you mean to do about this document. Is it, for example, the proposal to put on the bargaining table that was discussed during our most recent negotiating session? We presume that by your letter you are asking for another collective bargaining negotiating session.
>
> I would appreciate your response to these questions.

On August 21, Kullman replied,

> Your letter of August 18th has me as much confused as my letter of August 12th apparently has you. The Company is definitely not asking for any bargaining meeting.

Upon the preponderance of the evidence in the entire record, I find and hold that by negotiating on May 15 and

July 21, 1967, with no genuine effort to reconcile its differences with the Union and in a manner and with new proposals designed to frustrate rather than promote an agreement, Respondent further negotiated in bad faith and in violation of Section 8(a) (5) and (1) of the Act.

M. *Termination of Strike, Refusal to Reinstate Strikers, and Respondent's Refusal to Recognize Union.*

On November 22, 1967, Youngdahl, on behalf of the Union, notified Respondent that the strike was terminated the night before, November 21, and that "we hereby apply for reinstatement of all strikers to their old jobs, or, if their old jobs are unavailable, for any job. This is a continuing application for employment. Please inform me if you have any question about this application." In addition hundreds of strikers individually wrote Respondent as follows and Respondent received all the letters:

> Gentlemen: I hereby apply unconditionally for reinstatement to my old job, or if my old job is unavailable, for any job. Please consider this a continuing application for employment.

On November 28, 1967, Respondent's personnel director, McClain, replied to Youngdahl:

> In response to your telegram of November 22nd advising us of the termination of the ILGWU strike at our Little Rock plants and applying for reinstatement of all strikers, we ask that you furnish us immediately with a list of the names and addresses of all strikers who were drawing strike benefits from the ILGWU for the strike benefit period immediately preceding November 21, 1967. We also ask that you furnish us as quickly as possible with a list of the names and addresses of all others classified by you as strikers and on whose behalf you are allegedly making an application for reinstatement. We also ask that you and other Union representatives inform any persons on whose behalf

you have allegedly sought reinstatement by virtue of your telegram to promptly apply in person at the Personnel Office of our plants here in Little Rock.

On November 28, 1967, Respondent wrote ex-strikers (but did not send a copy to the Union) a letter saying:

> The International Ladies Garment Workers Union has called off its strike at our plants here in Little Rock and on behalf of all strikers has made an application for reinstatement on any available jobs. If you are one of those for whom the Union was acting, you should apply in person at our Personnel Office no later than . If you should fail to appear by such date, we shall assume that the Union's application was not made with your authorization and that you do not desire to work at our plants here in Little Rock.

On November 30, a union attorney wired President Guthum as follows:

> I am telegraphing as attorney for the International Ladies Garment Workers Union, AFL-CIO. Officials of the Union have been notified your firm has been directly contacting ex-strikers. On behalf of the Union, I protest this unilateral action, which flagrantly violates the National Labor Relations Act and undercuts the Unions bargaining status. To facilitate the reinstatement of the ex-strikers please be advised the Union will present to you applications for reinstatement on December 1, 1967, which will contain their names and addresses. To further accomplish this objective, the Union requests you transmit to it a list of all the names and addresses of the individuals whom your firm considered to be strikers when the strike commenced on October 25, 1965. On behalf of the Union, I request your firm transmit to me, as soon as possible, a list containing all the names of the individual ex-strikers to whom it has been sending letters asking them, in substance, to report to your personnel office by a certain date, and copies of all those letters sent to them since the Union terminated its strike on November 21,

1967. Finally, the Union requests your firm consult with it pertaining to reinstating the ex-strikers and the mechanics necessary to accomplish this objective.

On December 4, Youngdahl wrote the Company as follows:

I am writing as attorney for International Ladies' Garment Workers' Union, AFL-CIO. By this letter I wish to make clear the position of the union as to post-strike applications of the employees we represent in Little Rock.

On November 22, 1967, I informed you that as of November 21 the strike conducted by our organization had been terminated. At that time I stated that all strikers were thereby applying for reinstatement to their old jobs, or, if their old jobs were unavailable, for any jobs. I asked that my application on behalf of all strikers be considered a continuing application for employment.

By telegram from Mr. McClain dated November 27, 1967, a kind of reply was sent to me. You asked thereby for lists of names and addresses of all those receiving strike benefits during the period immediately preceding November 21, and "a list of the names and addresses of all others classified by you as strikers and on whose behalf you are allegedly making an application for reinstatement." You also asked the union to inform the employees for whom we speak to apply in person at your office.

Then by letter dated November 28, 1967, you wrote a large number of individual strikers saying, *inter alia*, that "if you are one of those for whom the Union was acting, you should apply in person" at the plant no later than a specified dead line.

As soon as this letter came to our attention, and in response to your telegram of November 27, on December 1, 1967, Mr. Lavey of this office protested your individual contacts with the employees we represent, but stated that in order to facilitate the return of the strikers, we would furnish you with further material

on December 1. That material, individual notices of names and addresses of some of the strikers in our possession at that time, was delivered to your office on that date. We also asked for information which might assist us to assist you in the reinstatement process, such as a list of names and addresses of those sent the November 28 letter, and copies of each letter because of possible variance among them.

We have received, to date, no response to this last communication.

It seems to us that you are in possession of the most accurate information about who the strikers are. You were able to identify them for purposes of insurance cancellation early in the strike, and for the mailing of November 28 and other mailings you have made to them since the strike started. In addition, we have from time to time informed you of individuals who came to our attention as possibly having been on leave when the strike began, but who later joined the strike.

It is our belief that a list of those receiving strike benefits at any time would be irrelevant now to any obligation of any party to this proceeding, or at least not necessary for us to furnish for reinstatement purposes. There are many strikers who have found temporary employment other places, thus not paid strike benefits, who have applied for reinstatement through my telegram of November 22, for example.

We do not believe that we are required to furnish you with information about whom we "purportedly" speak. We are the certified bargaining representative for all production and maintenance employees, and this includes all strikers. We believe, in fact, that your suggestions otherwise to individual strikers constitute improper undermining and interruption in further violation of the National Labor Relations Act.

If you could advise us of specific ways in which the records you used for your various mailings to individuals after the strike began are deficient, in an effort to cooperate we will do our best to assist you in finding,

for example, correct addresses. We have gone further in my opinion, than our legal obligations by delivering the material to brought to your office on December 1.

Please let me know if the union can do anything further within the confines of the principles I have set forth here.

On December 4, the Union sent Guthans two telegrams, the first reading as follows:

I am telegraphing as attorney for the International Ladies Garment Workers Union, AFL-CIO. Again, officials of this Union have been notified your firm has been directly contacting ex-strikers and instructing them to report to your personnel office by a certain date. On behalf of the Union, I again protest this unilateral action, which is flagrantly illegal and violative of the National Labor Relations Act and undercuts the Union's bargaining and representative status. The Union would be most willing to cooperate with your firm in facilitating the reinstatement of the ex-strikers. Again, the Union request your firm consult with it pertaining to reinstating the ex-strikers and the mechanics necessary to accomplish this objective. Please be advised the Union stands ready, willing and able to cooperate with you in obtaining total reinstatement of all the ex-strikers. Additionally, this Union stands ready and willing to cooperate with you to insure the reinstated ex-strikers report to your firm on dates specified by you and given to the Union.

The Union's second telegram of December 5 read as follows:

I am telegraphing as attorney for the International Ladies Garment Workers Union, AFL-CIO. Please be advised the Union is filing an unfair labor practice charge today alleging your firm has violated Section 8(a)(1) and (5) of the NLRA. The Union protests your piecemeal reinstatement of the ex-strikers and demands that you reinstate them as a group. Without prejudice to our unfair labor practice charge, and over

the Union's vigorous protest, the Union is forced to advise the ex-strikers to reply to your personnel office if they are contacted by your firm directly for re-employment as they are today.

On December 5, Kullman wired Youngdahl as follows:

On behalf of Kellwood Co. Ottenheimer Division this will notify you as attorney for International Ladies Garment Workers Union that this Company does not recognize that Union as the collective bargaining representative of the employees in the Company's plants at Little Rock, Arkansas. The Union's refusal to bargain in good faith toward a collective bargaining agreement during the extensive negotiations prior to the strike the Unions complete failure to seek bargaining on a contract or settlement of the strike for more than a year, and the obvious fact that this Union is no longer the collective bargaining representative of a majority of the employees in the plants, require this action. Any further recognition of the International Ladies Garment Workers Union as the collective bargaining representative of these employees is inconsistent with the spirit and purposes of the National Labor Relations Act as amended.

On December 6, 1967, Kullman wrote Youngdahl as follows:

I am writing as attorney for Ottenheimer in response to your letter of December 4, 1967. I received a copy of your letter today. Please refer to my telegram of December 5, 1967. This telegram furnished a reply to all of the issues raised in your letter of December 4, 1967.

On December 7, a union attorney again wired Guthanz protesting the Company's re-employment of some of the ex-strikers as new employees and its piecemeal re-employment of the ex-strikers.

On December 12, 1967, Respondent's personnel director sent letters to ex-strikers (but did not send a copy to the Union) reading as follows:

> On November 28, 1967, we wrote to you asking that you contact us by _____ if you desired employment. On December 1, 1967, the Union gave to us an application with your signature dated _____. In order to avoid any misunderstanding as to whether you intended your application of _____ to be in answer to our letter of November 28, 1967, we again ask that you come to the plant by _____ so that the application may be processed.

At the hearing the parties stipulated that beginning at a date in July 1967, Respondent has hired new hires as new employees, including those returning from the strike, that the Company has required each employee hired subsequent to that date to qualify as a new employee for its insurance, holiday and vacation benefits, or any other benefits requiring length of service for qualification; this is the Company practice up to the present time.

Conclusions.

On November 22, 1967, the Union informed Respondent the strike was terminated and made an unconditional application on behalf of all strikers for reinstatement. Respondent's failure to offer the strikers immediate and full reinstatement to their former jobs was a violation of Section 8(a)(3) and (1) of the Act. *Mastro Plastics Corp.* v. *N. L. R. B., supra; N. L. R. B.* v. *Southland Cork Company, supra; N. L. R. B.* v. *Stilley Plywood Co., Inc., supra; Solo Cup Company* v *N. L. R. B.*, 332 F. 2d 447, 449 (C. A. 4); *Great Southern Trucking Co.* v. *N. L. R. B.*, 127 F. 2d 180, 186 (C. A. 4). In addition, by bargaining directly with the strikers concerning their return to work, over the Union's protest, Respondent deprived the striking employees of their right to representation by the Union on

this phase of their employment and tenure, and also refused to recognize the Union as the strikers' statutory representative for this purpose, Respondent thereby further violating Section 8(a)(5) and (1) of the Act. See *Alba-Waldensian, Inc.*, 167 NLRB No. 101.

Respondent canceled its recognition of the Union on December 5, 1967, on the theory that it was an economic strike, the strikers had been replaced, and the Union no longer represented a majority. In fact, they were unfair labor practice strikers who were still employees and still represented by the Union. Respondent's denial of further recognition of the Union was further violation of Section 8(a)(5) and (1) of the Act. Cf. *Franks Bros. Company* v. *N. L. R. B.*, 321 U. S. 702, 64 S. Ct. 817; *N. L. R. B.* v. *Commerce Company d/b/a Lamar Hotel*, 328 F. 2d 600, cert. denied 379 U. S. 817; *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785; *Satilla Rural Electric Membership Corporation*, 155 NLRB 747.

N. Identification of the Individual Strikers.

There remains the question of the identification of the individual strikers who are entitled to reinstatement with full rights under this Decision.

General Counsel's Exhibit 171 shows what employees were on the last payroll before the strike (October 22, 1966) and not on the first payroll following the beginning of the strike (November 5, 1966). This information was presumably obtained from the Company payrolls supplied by the Company and not challenged. General Counsel's Exhibit 171 shows also which of these employees had their insurance canceled early in the strike,[30] which registered with

30. On November 4, 1966, Respondent wrote all strikers that it would not continue "the payment of premiums" on the Company's existing hospitalization insurance policy, inasmuch as the policy defines an "employee" as a person actually performing services for the Company.

the Union for strike benefits and which were paid strike benefits and which were paid strike benefits, which of these employees individually wrote Respondent asking for reinstatement, which were sent Respondent's November 28 and December 12, 1967, letters concerning coming to the plant. The information on which General Counsel's Exhibit 171 is based, except for the payroll named and those who registered for strike benefits, is contained in the record in General Counsel's Exhibits 173, 174, 175, and 176.

Based upon documents in evidence, the General Counsel also submitted lists, attached to General Counsel's Exhibit 171, of employees not on the October 22 and November 5 payrolls but who registered for strike benefits; but who wrote letters seeking reinstatement; but who were sent Respondent's November 28 letter; but who were sent Respondent's December 12 letter; but who were paid strike benefits.

The General Counsel contends that each employee on these lists was a striker. None of the names on any of these lists was challenged as a striker by Respondent at or since the hearing. Upon due consideration I agree that the evidence in the record proved that each employee listed on General Counsel's Exhibit 171 and its attachments was a striker.

The General Counsel and Union contend that they should not be foreclosed until the end of the backpay proceeding from adding the names of any additional employees concerning whom there is proof by that time that they were strikers. I agree and so hold.

O. *Respondent's Principal Defense.*

Respondent contended that it bargained in good faith, that it was the Union who bargained in bad faith, and that the Union's actions justified Respondent's. The Union's actions Respondent principally complained of, its conduct

which may have to some extent obstructed or delayed the bargaining process, has been considered in all the above. Although the Union did not conduct itself impeccably, its actions were not in violation of the Act when measured against Respondent's hostile, preventive, unlawful acts, including its unlawful bargaining. Respondent must not have thought the Union was acting unlawfully or bargaining in bad faith prior to the hearing, for it never filed an 8(b)(3) or 8(b)(1)(A) charge against the Union. Further, I think it is clear from the record that even if the Union's conduct had been above reproach, this would not have affected Respondent's fixed determination to avoid a collective-bargaining agreement with the Union.

IV. The Effect of the Unfair Labor Practices Upon Commerce.

The activities of Respondent set forth in Section III, above, occurring in connection with Respondent's operations described in Section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy.

I recommend the customary broad cease-and-desist order and the affirmative relief conventionally ordered in cases of this nature, where Respondent's unfair labor practices were of a character which struck at the roots of employee rights safeguarded by the Act.

The Supreme Court has said "... a bargaining relationship once rightfully established must be permitted to exist and function for a reasonable period in which it can be given a fair chance to succeed." *Franks Bros. Co.* v.

N. L. R. B., supra; Mar-Jac Poultry Co., Inc., supra; Satilla Rural Electric Membership Corporation, supra.

Here, as has been seen, during the certification year Respondent refused and failed to bargain in good faith with the Union, granted unilateral wage increases to unit employees, and extended itself to undermine the power and prestige of the Union. Here, where Respondent has never bargained in good faith with the Union, the certification has never been honored and the bargaining relationship has never been given a fair chance to succeed. Respondent's bad faith bargaining continued during the strike and even on the question of reinstating the strikers. Under all the circumstances of this case, and in order to give the bargaining relationship a reasonable period in which it can have a fair chance to succeed, I recommend that Respondent immediately recognize the Union as the bargaining representative of the employees in the appropriate unit, bargain in good faith with the Union for at least 1 year beginning with the first bargaining session after recognizing the Union, and embody in a signed agreement any understanding reached.

The Union urges that backpay for the strikers should start from the beginning of the strike. That would be appropriate, in my judgment, if Respondent's unfair labor practices were the sole cause of the strike. Here, where the unfair labor practices were only one of the causes, I recommend as an appropriate remedy the customary remedy in cases such as this. I recommend that Respondent be ordered to offer to all strikers, including those named on General Counsel's Exhibit 171 and its two pages of attachments, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, discharging, if necessary, any replacements in order to provide work for the strikers; and to make whole all strikers, including

those named on General Counsel's Exhibit 171 and its two pages of attachments, for any loss of earnings they may have suffered by reason of the discrimination against them, by payment to each of a sum of money equal to that which each normally would have earned as wages from 5 days after the strikers' unconditional requests for reinstatement on November 22, 1967, to the date of his full reinstatement less the net earnings of each during such period. The backpay provided herein shall be computed in accordance with the formula stated in *F. W. Woolworth Company*, 90 NLRB 289. Interest shall be added at the rate of 6 percent per annum. *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Upon the basis of the foregoing findings of fact and the entire record in the case, I make the following:

Conclusions of Law.

1. Kellwood Corporation, Ottenheimer Division, of Little Rock, Arkansas, is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Ladies' Garment Workers' Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since March 23, 1966, Respondent has violated Section 8(a)(5) and (1) of the Act by refusing and failing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit:

> All production, maintenance and shipping employees at Respondent's Little Rock, Arkansas, operations, excluding office clerical employees, professional employees, engineering department employees, outlet stores' employees, guards and supervisors as defined in the Act.

4. Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally increasing wages on October 25, 1966, and February 1, 1967.

5. Respondent violated Section 8(a)(5) and (1) on December 21, 1966, by refusing to give the Union information relevant and reasonably necessary to the Union's intelligent bargaining concerning a bargaining issue Respondent had raised.

6. The strike which began October 25, 1966, was caused and prolonged by Respondent's unfair labor practices.

7. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate the strikers, including those named on General Counsel's Exhibit 171 and its two pages of attachments, upon the termination of the strike and the Union's unconditional application for reinstatement on behalf of all the strikers on November 22, 1967.

8. Respondent violated Section 8(a)(5) and (1) of the Act by bargaining directly with strikers concerning their return to work during the strike and after the strike.

9. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize the Union as the exclusive bargaining representative of the employees in the appropriate unit on and after December 5, 1967.

10. Respondent violated Section 8(a)(1) of the Act by its repeated efforts to frighten its employees away from the Union and to defeat the Union at the election, by talk of a strike when there was no serious consideration among employees or union organizers of striking the plant.

11. Respondent violated Section 8(a)(1) of the Act by its efforts to convince employees of the futility of their joining, supporting, and voting for the Union.

12. Respondent violated Section 8(a)(1) of the Act by its repeated threats that unions and strikes go together,

that a strike was inevitable if the Union won the election, and that in a strike the employees might lose their jobs, Respondent thereby impliedly threatening economic loss to employees.

13. By denigrating the Union, Respondent further violated Section 8(a)(1) of the Act.

14. By impliedly informing employees that it would not negotiate and sign a contract with the Union, Respondent further violated Section 8(a)(1) of the Act.

15. Respondent violated Section 8(a)(1) by interrogating employees and interfering with them concerning the exercise of their Section 7 rights and by passing antiunion leaflets and permitting antiunion petitions to be passed on the work line during working time.

16. Respondent violated Section 8(a)(1) of the Act by introducing as true and showing to employees the film "And Women Must Weep."

17. The aforesaid labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Recommended Order.

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record in the case, I recommend that Respondent, Kellwood Company, Ottenheimer Division, of Little Rock, Arkansas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to recognize the Union as the exclusive representative of the employees in the appropriate unit.

(b) Refusing and failing to bargain in good faith with the Union as the exclusive bargaining representative of the employees in the following appropriate unit:

All production, maintenance and shipping employees at Respondent's Little Rock, Arkansas, operations, excluding office clerical employees, professional employees, engineering department employees, outlet stores' employees, guards and supervisors as defined in the Act.

(c) Unilaterally granting wage increases to employees in the appropriate unit.

(d) Refusing to give the Union requested information that is relevant and reasonably necessary to the Union's intelligent bargaining concerning a bargaining issue raised by Respondent or any other bargaining issue.

(e) Refusing to reinstate unfair labor practice strikers upon the termination of the strike and their unconditional application for reinstatement.

(f) Bargaining directly with unfair labor practice strikers concerning their return to work during the strike and after the strike.

(g) Frightening employees by talk of a strike when their is no serious consideration of a strike among employees and union organizers.

(h) Threatening employees that it is futile for them to join, support, and vote for a union.

(i) Threatening that unions and strikes go together, that a strike is inevitable if a union wins an election, and that in a strike employees might lose their jobs.

(j) Denigrating the Union by referring to it as a parasite and a leech, etc.

(k) Threatening employees that it will not negotiate and sign a contract with the Union, with dire consequences to the employees.

(l) Interrogating employees and interfering with them concerning the exercise of their Section 7 rights.

(m) Passing antiunion leaflets and permitting antiunion petitions on the work line during working time.

(n) Introducing as true and showing to employees the film "And Women Must Weep."

(o) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the policies of the Act:

(a) Upon request recognize and bargain collectively and in good faith with the Union as the exclusive representative of all its employees in the appropriate unit, and embody in a signed agreement any understanding reached.

(b) Bargain in good faith with the Union concerning any wage increase or any other change of any term or condition of employment, before putting it into effect.

(c) Upon request give the Union requested information that is relevant and reasonably necessary to the Union's intelligent bargaining concerning any issue raised by Respondent or any other bargaining issue.

(d) Offer to all strikers, including those named on General Counsel's Exhibit 171 and its two pages of attachments, immediate and full reinstatement to their former or substantially equivalent positions, discharging if necessary employees hired since the commencement of the strike, and make each striker whole for any loss of pay he may have suffered because of the discrimination against him, in the manner set forth above in the section of this Decision entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records

necessary to analyze the amount of backpay due under the terms of this Recommended Order.

(f) Post at its three plants in Little Rock, Arkansas, copies of the attached notice marked "Appendix."[31] Copies of said notice, on forms provided by the Regional Director for Regional 26, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to all employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 26, in writing, within 20 days from the receipt of this Decision, what steps have been taken to comply herewith.[32]

Dated at Washington, D. C.

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31. In the event that this Recommended Order is adopted by the Board, the words "a Decision and Order" shall be substituted for the words "the Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's Order is enforced by a decree of a United States Court of Appeals, the words "a Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words "a Decision and Order."

32. In the event that this Recommended Order is adopted by the Board, this provision shall be modified to read: "Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

APPENDIX.

NOTICE TO ALL EMPLOYEES.

Pursuant to the Recommended Order of a Trial Examiner of the National Labor Relations Board and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

WE WILL NOT refuse to recognize and bargain collectively in good faith with International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive representative of all our employees in the appropriate unit at our Little Rock plants.

WE WILL NOT grant pay raises or make any other changes in terms or conditions of work of employees in the appropriate unit without first bargaining in good faith with the Union concerning them.

WE WILL NOT refuse to give the Union information which is relevant to bargaining issues and which is reasonably necessary to the Union's intelligent bargaining concerning those issues.

WE WILL NOT during a strike caused by our unfair labor practices bargain directly with the strikers rather than the Union concerning their return to work.

WE WILL NOT frighten employees by talk of a strike when there is no serious consideration of a strike among employees and union organizers.

WE WILL NOT try to convince employees that their joining and assisting the Union will do them no good.

WE WILL NOT threaten employees that unions and strikes go together, that a strike is inevitable if the Union wins an election, and that in a strike employees might lose their jobs.

WE WILL NOT refer to the Union as a "parasite," a "leech," or a "mess."

WE WILL NOT threaten that we will not sign a contract with the Union and that as a result employees will suffer.

WE WILL NOT interrogate employees and interfere with them concerning their union sympathy and activity.

WE WILL NOT pass out antiunion leaflets or permit antiunion petitions to be passed on the work line during working time.

WE WILL NOT exhibit the motion picture "And Women Must Weep" to any employees.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Ladies Garment Workers' Union, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or any other mutual aid or protection or to refrain from any and all such activities.

WE WILL, upon its request, recognize International Ladies' Garment Workers' Union, AFL-CIO, as the exclusive bargaining representative of all employees in the appropriate unit in the Little Rock plants, bargain in good faith with said Union, and put into writing and sign any agreement reached as a result of the good-faith bargaining. The appropriate unit consists of:

> All production, maintenance and shipping employees at our Little Rock, Arkansas, operations, but excluding office clerical employees, professional employees, engineering department employees, outlet stores' employees, guards and supervisors as defined in the Act.

WE WILL bargain in good faith with the Union concerning any wage increase or any other change of any term or condition of employment which we wish to make, before putting it into effect.

WE WILL, upon request, give the Union information which is relevant to bargaining issues and reasonably necessary to the Union's intelligent bargaining concerning those issues.

WE WILL offer to all unfair labor practice strikers, including those named on General Counsel's Exhibit No. 171 and its two pages of attachments, immediate and full reinstatement to their former of substantially equivalent positions (dismissing, if necessary, any replacements hired since the strike started October 25, 1966), and make them whole for any loss of pay each may have suffered as a result of the discrimination against them, as provided in the Trial Examiner's Decision.

All our employees are free to become or refrain from becoming members of International Ladies' Garment Workers' Union, AFL-CIO.

KELLWOOD COMPANY,
OTTENHEIMER DIVISION

Note: We will notify all unfair practice strikers, including those named in General Counsel's Exhibit No. 171 and its two pages of attachments, if presently serving in the Armed Forces of the United States of their right to full reinstatement upon application in accordance with the Selective Service Act and the Universal Military Training and Service Act, as amended, after discharge from the Armed Forces.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 746 Federal Office Building, 167 North Main Street, Memphis, Tennessee 38103, Telephone 901-534-3161.

APPENDIX D-1.

Opinion of the United States Circuit Court of Appeals for the Fifth Circuit in M. R. & R. Trucking Co. v. NLRB, ... F. 2d ....., 75 LRRM 2790 (December 4, 1970).

Before GODBOLD, DYER, and MORGAN, *Circuit Judges.*

FULL TEXT OF OPINION.

GODBOLD, *Circuit Judge:*—The principal issue on this appeal is whether in the period July 2, 1967 to January 2, 1968 MR&R refused to bargain in good faith and engaged in mere surface bargaining with the union,[1] in violation of §§ 8(a)(5) and 8(a)(1).

The union was certified in October, 1965 as representative of a unit of approximately 30 local drivers, dockmen and helpers, including part-time "casual" employees, at MR&R's Jacksonville, Florida terminal. Bargaining commenced in January, 1966. The Trial Examiner found:

> . . . This is a case involving an attempt to reach a first agreement at the Jacksonville terminal, the result being that the bargaining had literally to be "from scratch." The processes of bargaining were hampered by changes in the identity of union negotiators and by frequent and protracted delays not attributable solely to the fault of the Company. While it is true that some of the Company's wage offers were relatively small, it is also true that some of the Union's demands were relatively large. • • • It does not appear that the Company refused reasonable requests to meet or failed to devote sufficient time to the actual negotiating sessions. The evidence seems rather to suggest that if there is any single cause of the failure of the bargaining proc-

1. Local 512 of the Teamsters.

> ess here it most probably is the changes of identity of the union negotiators and their failure to press for more frequent and more extended discussions.

The Examiner concluded the evidence was insufficient to support a finding of failure to bargain in good faith. The Board rejected his findings on this issue and found the company had failed in its bargaining obligation. We decline to enforce on that issue.

This case is not easy. As this court has pointed out, "in few other instances is the task of judging so difficult" as in the refusal to bargain case, where the factors are subtle and elusive, and conduct which at one time may be manifest good faith may, under other circumstances, be mere pretense. NLRB v. Herman Sausage Co., 275 F. 2d 229, 45 LRRM 2929 (5th Cir. 1960). Bargaining lasted for eight months of 1966, with 15 to 20 sessions, followed by a spirited recertification election and then six months of inactivity. In July, 1967 negotiations resumed. After three meetings the parties were close to agreement, but agreement was not reached and the union struck.

A host of events, some important and some minutiae, have been detailed by the Board as evidentiary of failure to bargain in good faith. The limitations of § 10(b) preclude conduct before July 2, 1967 being held unlawful, but 1966 events are considered in the name of "background." When it all ends up, the 1966 background tail almost wags the 1967 dog.

We examine the evidence, mindful on the one hand of our limited scope of review, and on the other of our duty not to rubberstamp Board decisions. There are few credibility choices. The Board did not produce as a witness the chief union negotiator in the 1966 negotiations. The Trial Examiner accepted as credible the chief company

negotiator, an attorney, and the Board did not disturb that credibility finding.

This case is one of hard-nosed bargaining from both sides of the table, and use by both company and union of naked power. Both company and union flexed their muscles, and the company turned out to be the stronger. But this is not forbidden. We will not restate here the full history of the bargaining, much of which appears in the Board's reported order.[2] Rather we refer to particular aspects which go to the heart of the Board's decision.

1. The 1966 Bargaining Negotiations.

The Board strongly emphasizes as background the conduct of the company in 1966 bargaining negotiations. A key conclusion is that the company "chose to renege" on a wage proposal it had made "solely because it believed that it would be unable to avoid agreement on a contract if it left its offer open."

At the first or second session, in January, the company made a lengthy, comprehensive written proposal for a contract, omitting economic benefit provisions. The union responded with its written proposals, and bargaining continued using both proposals. By March 21, after seven to ten sessions, many essential matters had been agreed upon.

On March 21 the first full fledged bargaining for wages occurred. The company offered a 7-6-7 cent per hour increase over the three year term on which bargaining discussions had been based.[3] The union proposed a 10-10-10 increase. The Board found:

> Although the Union then told Respondent that it did not regard the offered increase as adequate, it recon-

2. 178 NLRB No. 35, 72 LRRM 1014.

3. There is some testimony that on an earlier date, apparently on a very informal basis, the company had offered a 6-6-6 increase.

> sidered the matter after the meeting had adjourned and advised Respondent a few days later that it was now willing to submit a contract containing the 7-6-7-cent-wage increase offer to a vote of the employees. By letter dated March 29, Respondent advised the Union that as the Union had failed to accept the wage proposal at the March 21 meeting, the offer had lapsed and that Respondent was not willing to grant a contract on that basis. No economic justification for the withdrawal of the wage proposal was offered to the Union. Nor was any asserted at the hearing. In these circumstances, and in light of what follows, we can only conclude that Respondent chose to renege on the wage proposal solely because it believed that it would be unable to avoid agreement on a contract if it left its offer open.

These conclusions overshoot the mark by what they do and do not say. When the offer was made the union negotiators did not merely express the view that the offer was inadequate but said they "couldn't even consider it" and rejected it somewhat disdainfully. The company negotiator made no representation that the rejected offer would remain open. A few days later the chief union and company negotiators had another conversation about the 7-6-7 figure, either by phone or in a chance meeting on an airplane. The union negotiator said that he "might submit this [the 7-6-7 offer]—might want to submit this to his people, if his superiors would let him." The company negotiator told him the company had never been fully satisfied with its offer and thought it was too much, that so far as he was concerned the offer had been declined and was no longer open. A day or two later the company negotiator wrote the letter referred to by the Board in the above question.

These events are not substantial evidence that the union reconsidered and that it was "now willing" to submit the offer to a vote, or, more important, that the company "reneged" on its wage proposal and made an "unexplained

withdrawal" of it. The company was not bound to leave open or to reinstate a rejected proposal, cf. NLRB v. Alva Allen Industries, 369 F. 2d 310, 63 LRRM 2515 (9th Cir. 1966); Perfect Service Gas Co., Inc., 146 NLRB 1296, 56 LRRM 1121 (1964); Solar Aircraft Co., 109 NLRB 130, 34 LRRM 1298. A rule to the contrary would make it well nigh impossible to have effectual give-and-take bargaining.

The Board concluded that in April, 1966 the company told the union it would not make any wage increase proposal "unless and until" two things occurred—pending charges were disposed of by the Board or withdrawn by the union, and the union abandoned its organizational efforts at other MR&R terminals. During bargaining the union stated that it was going to force the company to agree to what the union thought was a good contract by organizing all other MR&R terminals and shutting the company down when it would hurt, that the company had better get the "best hold it could." The local sent representatives to the other terminals, including those outside its jurisdiction. Petitions for elections were filed by the local, and a sister local, for five terminals, and the Teamsters sought to promote elections at other terminals but could not arouse sufficient interest. What company representatives said on this particular subject, according to both union and company negotiators was that while the company was not pleading poverty, the pending representations petitions and charges were costing a lot of money, and the company was going to wait and see how it came out with them before it made any further wage offer. This is a long way from the flat refusal to sit down and bargain at all, in the cases on which the Board relies,[4] or even to

4. E.g., *NLRB v. Rybolt Heater Co.*, 408 F. 2d 888, 70 LRRM 3150 (6th Cir. 1969); *NLRB v. Southland Cork Co.*, 342 F. 2d 702, 58 LRRM 2555 (4th Cir. 1965).

bargain about wages. The union had injected into the negotiations its use of economic power to force the company to agreement, and had set in process the means to attempt to apply that force. The company did not know whether the union threat was a meaningful one or a paper tiger. It developed that the union lost the elections at Tallahassee and Marianna, Florida, and Atlanta. It won at Quincy, Florida, where there were four people in the unit. It never requested bargaining for that terminal, no bargaining ever occurred, and in 1967 the union disclaimed representation of the unit. A sister local won the election in Pensacola.

The company could not refuse to bargain, either at all or with respect to wages, because of the pendency of charges filed by the union, and reference by the company to the charges was evidence of bad faith. But in the overall picture it has small import.[5] Section 8(a)(3) charges already had been formally settled when the remark was made. The 8(a)(5) charges were withdrawn in the summer of 1966. The remark was uttered in the context of the company's not making a further wage offer, but at the next meeting the company did make another offer, which the union rejected.

In June MR&R proposed a five-year contract with annual six cents per hour increases such as the union recently had signed with an unrelated employer, if the union would cease its organizational efforts at other terminals. The Board interpreted this as evidence of unwillingness to agree to any contract for increased wages and therefore evidence of bad faith. Its reasoning is not clear. As best we can deduce, the Board considered that coupling the

5. Nor may this single incident constitute a per se refusal to bargain Cf. *NLRB* v. *Dalton Brick & Tile Corp.*, 301 F. 2d 886, 889, 49 LRRM 3099 (5th Cir. 1962).

offer with cessation of the organizational efforts was a condition so unpalatable to the union that the offer was an illusory one, not expected or intended to be accepted. But the union considered the offer and rejected it because of dissatisfaction with the amount of the proposed increase and the life of the contract.

In September the parties met with a federal mediator. By then the Board elections had been held at the other terminals, and it was clear that the union could not carry out its threat to organize and shut down all terminals. The union proposed the 7-6-7 figure that had been made, rejected and withdrawn in March, or a one-year five-cent increase. The company rejected these on the ground that its bargaining position had become stronger and the union's weaker. The company was not forbidden to use its increased bargaining strength to its advantage, so long as it dealt in good faith in an effort to reach accord. NLRB v. Alva Allen Industries, Inc. supra. "[T]here is simply no inconsistency between the application of economic pressure and good faith collective bargaining." NLRB v. Insurance Agents' International, Inc., 361 U. S. 477, 494-95, 4 L. Ed. 2d 454, 467, 45 LRRM 2704 (1960).

When the company rejected the union proposals, the union withdrew them, a fact which becomes of significance when considering the October meeting. The withdrawal is not referred to in the Board decision.

The Board found that in the last 1966 meeting in October, the company "refused to consider any contract contemplating a wage increase." The record does not support this. The union wage offer made in September had been withdrawn. The company made no wage offer. At this meeting there was discussion of recertification of the union. The

Board found this originated with the company, that the company questioned the union's majority status when it had no basis to do so, and that termination of certification was asserted by the company as a basis for its position. But the union negotiator employed the prospect of re-certification as a negotiating weapon.[6] The two negotiators agreed that the union should request an election "on the basis of a good faith doubt."

The election was held in December, and the Teamsters won. On that day the company notified the union it was "ready, willing and able" to resume bargaining. For six months nothing was heard from the union. In June, 1967 it asked for bargaining to resume, and meetings commenced again in July.

2. The 1967 Bargaining.

When bargaining began again on July 21, the union was represented by different negotiators than it had in 1966.

The Board concluded that the company approached the 1967 negotiations determined to withhold any economic fruits of bargaining and to avoid consummation of an agreement. Central to this conclusion is the finding that at the first bargaining session on July 21 the company offered terms and conditions of employment less favorable than what it had tentatively agreed to grant in the 1966 negotiations. The Board considered that the company deliberately framed a contract proposal which it could reasonably predict the union would not accept, that it meant to compel discussion of matters seemingly settled in 1966 and thereby prolong and impede the conduct of the new negotiations.

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6. The union negotiator said: "I've still got a lot of strength in this unit . . . I'm not going to walk away and leave these people. . . . I am going to get recertified." The company response was that it had nothing to lose by an election and would cooperate and assist the union in getting an election, that either the company or union could request it.

But it is clear that both parties approached the new negotiations considering themselves not bound by the terms hammered out the preceding year. The Board omitted from its decision the fact that the July 21 session commenced with a proposal from the new union negotiators that the parties sign the Teamsters' National Master Freight Agreement and that wage increase of 25, 15 and 15 cents be granted for a three-year period.[6a] On noneconomic matters this was a major departure from what had been agreed on in 1966. The wage increase demand was 2½ to 3½ times that last made by the union. The company then presented it written proposal (complete except for economic benefits) which embraced changes in several noneconomic matters from those agreed on the year before, some of them important ones.[7]

On July 21, in approximately four hours of negotiation the parties agreed on 21 articles (out of 36 contained in the company proposal) and on some sections of the remaining articles.

6a. These were the increases called for by the National Agreement.

7. The Board emphasizes the addition of a stiffer "management rights" clause, which it views as one to which "no self-respecting union could agree," leading to the inference that it was brought forward to avoid reaching agreement. See *NLRB* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 32 LRRM 2225 (1st Cir.) cert. denied, 346 U. S. 887, 98 L. Ed. 391, 33 LRRM 2133 (1953) and *Vanderbilt Products, Inc.* v. *NLRB*, 297 F. 2d 833, 49 LRRM 2296 (2d Cir. 1961). The Ninth Circuit has pointed out that, arguendo, a party's proposal may be so extreme or bizarre as to give rise to an inference of bad faith but that such a principle, if accepted at all, must be narrowly restricted, otherwise it imperminibly undermines the policy of § 8(d) of the Act. *NLRB* v. *MacMillan Ring-Free Oil Co.*, 394 F. 2d 26, 68 LRRM 2004 (9th Cir. 1968). In the instant case the company's stronger proposal was countered by the union's presentation at the next meeting of a management rights proposal taken from the National Master Freight agreement.

Union stiffening of demands beyond terms agreed on in 1966 continued at the second meeting, on August 11, 1966, as to overtime and vacation. Also the union demanded the company purchase its health and welfare plan, which was more costly than the company plan which the union had agreed to in 1966. The union reiterated its 25-15-15 wage increase proposal. The company responded with 0-5-5. The Board considered it evidentiary of bad faith that this offer was smaller than any made in 1966. But it was made as a counter to the highly escalated union demand. The union rejected it. The Board found this wage offer was "in effect a take it or leave it offer" because six days after it was made and rejected the company posted a notice to its employees which said that the company had made its "best offer for a three-year contract," that the union had rejected it, and the union had requested another meeting "for what purpose we do not know." With the most liberal deference to expertise, this is not fairly read as a statement that the offer, when made a week earlier and rejected, had been on a "take it or leave it" basis. Nor is it fairly read as a statement that an impasse had been reached.

August 31 was the next meeting. Both sides gave some ground. In the two August meetings agreements were reached on many matters, including length of probationary period for new employees, dues check off, and seniority. By the end of the meeting the parties were, as the union negotiator described it, "pretty close together." The union indicated that the company offer of 0-5-5 left it no alternative but to resort to economic action. Nevertheless, it agreed to submit the offer to its members for a vote and to get back in touch with the company negotiator. The union did not communicate further with the company and on September 6 struck without notice.

The union negotiator testified that until the meeting of August 31 the company was trying to bargain, but that the company's conduct on that date was "take it or leave it," which required a strike. This is inconsistent with the view of the Board that in all negotiations since March, 1966 the company had been engaging in pretense bargaining. The president of the local testified that the strike was for economic reasons.

In November the parties met with a mediator. For the second time the union was represented by persons who had taken no part in prior bargaining.[8] The chief union negotiator did not know what the last offer was that the union had made, and he had made no effort to find out. The new union negotiators proposed a return to the National Master Freight Agreement (which had been brought forward in July and dropped as a basis for discussion) plus the pay scale then in effect in Atlanta. This would have required an increase of either 52 cents or 57 cents per hour for the first year.

This meeting was frustrated by differences over the status of replacements hired for strikers. The union did not request additional meetings. In December, 1967 the company filed a petition for an election. In January the union filed charges of failure to bargain in good faith.

From the foregoing it is seen that the Board's treatment of the underlying evidence, largely undisputed, is deficient in two major respects. Recognition is not given to the hard bargaining and exertion of economic force by

8. Company negotiators were the same throughout. During the same period that the instant negotiations were going on the company negotiator, Currie, and company president McKenzie successfully negotiated a contract with a different Teamsters local in Tampa, Florida, covering a unit in another trucking company of which McKenzie also was president.

both sides and to the right of the company to use the stronger bargaining position in which it found itself. "[T]he use of economic pressure by the parties is not a grudging exception to some policy of completely academic discussion enjoined by the Act; it is part and parcel of the process of collective bargaining." *NLRB* v. *Insurance Agents International*, 361 U. S. at 498, 4 L.Ed. 2d at 468, 45 LRRM 2711 (1960). The Board's failure to recognize the applicability of this principle is but part of a broader deficiency, which is its treatment of actions of the company as though existent in isolation, without regard to the context of negotiations in which they arose on the particular actions of the union to which they were responses. Also consideration must be given to the obvious deficiencies of the union in the bargaining process, its changes of negotiators and their unfamiliarity with the issues. It is for the Board to draw inferences from the evidence. But Universal Camera[9] settled that substantiality of evidence is measured by consideration of all the evidence and not merely that which supports the Board's conclusions.

We conclude that the Board decision of failure of the company to bargain in good faith is not "based upon such relevant evidence as a reasonable mind might accept as adequate to support it." NLRB v. O. A. Fuller Supermarkets, Inc., 374 F. 2d 197, 200, 64 LRRM 2541 (5th Cir. 1967). We are unable conscientiously to conclude that the evidence supporting that finding is substantial.

Neither the Board nor this court sits to, directly or indirectly compel concessions or otherwise sit in judgment on the substantive terms of bargaining agreements or to step into the negotiations and seek to impose its own views of a desirable settlement. H. K. Porter Co., Inc. v. NLRB, 397 U. S. 99, 25 L. Ed. 2d 146, 73 LRRM 2561

9. *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474, 95 L. Ed. 456, 27 LRRM 2373 (1951).

(1970); NLRB v. Insurance Agents, 361 U. S. 477, 487, 4 L. Ed. 2d 454, 463, 45 LRRM 2704 (1960); NLRB v. American Insurance Co., 343 U. S. 395, 404, 96 L. Ed. 1027, 1037, 30 LRRM 2147 (1954); NLRB v. Herman Sausage Co., supra. It is not for the Board to balance the scales or equalize or neutralize pressures in the name of lack of good faith. Collective bargaining is, by its very nature, "an annealing process hammered out under the most severe and competing forces and counteracting pressures." NLRB v. Walton Brick & Tile Corp., 301 F. 2d 886, 895, 49 LRRM 3099 (5th Cir. 1962).

Our conclusion is not changed by the § 8(a)(1) violations which occurred during the 1967 negotiations. They were peripheral and recognized by the Board as such, involving one employee, a casual, and statements or questions to him by the terminal manager and a foreman. Only one statement had any meaningful evidentiary value as to failure to bargain, which was a remark of the warehouse foreman that the president of the company would let grass grow under the trucks before he would let the company go union.

3. Incidents After the Strike.

The refusal of the company to reinstate strikers was not a violation of the Act, since the strike was not an unfair labor practice strike.[10]

As bearing on the refusal to bargain issue, the Board found that MR&R acted unilaterally to abolish the job classification of casual employees, abandon the 90-day

10. There has not been raised the possibility that a striker who unconditionally applied for reinstatement and whose position was filled by a permanent replacement may be entitled to reinstatement upon the departure of the replacement. See *NLRB* v. *Fleetwood Trailer Co.*, 389 U. S. 375, 19 L. Ed. 2d 614, 66 LRRM 2737 (1967); *Laidlaw Corp.* v. *NLRB*, 414 F. 2d 99, 71 LRRM 3054 (7th Cir. 1969).

probationary period for new employees, and increase the starting wage rate from $2.90 to $3.00 per hour. We agree with the Trial Examiner that there was no duty to bargain with respect to these matters. The company had been struck with no warning, after failure of the union to let the company know the results of a vote on the 0-5-5 offer. MR&R is a common carrier, in a public service business, with not only a right but a duty to operate. It wrote the strikers on September 7 to return to work on September 11 or the company would hire permanent replacements, and from September 7 to 11 used supervisory personnel and temporary replacements brought in from its other terminals. Then it hired replacements as permanent employees rather than as casuals or probationers, at the regular starting rate rather than the probationer rate, and without a probationary period. The testimony of company officials was that under the circumstances the company could not afford the luxury of a probationary period. The substantial evidence is, as the Trial Examiner found, that the classification of casuals was not abolished but that the jobs were eliminated temporarily in response to the emergency conditions.[11] The company's actions, under the circumstances, were reasonably directed to insuring the continuance of operations. There was some violence, a state court injunction, and a few strikers were held in contempt. In the exigencies of the situation the company was not required to negotiate with the striking union about these deviations in terms and conditions of employment. NLRB v. Abbott Publishing Co., 331 F. 2d 209, 55 LRRM 2994 (7th Cir. 1964); Hawaii Meat Co. v. NLRB, 321 F. 2d 397, 53 LRRM 2872 (9th Cir. 1963); Local 1175, Sign & Pictorial Union v. NLRB, 419 F. 2d 726, 72 LRRM 2274, 2280, 2688 (D. C. Cir. Sept. 23, 1969).

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11. A number of casuals have since been hired.

4. Other Issues.

There is ample evidence to support the Board's finding that the company violated § 8(a)(1) by the interrogation and threats concerning union activities, which we have described above in part 2. As to these violations the Board order will be enforced.

Enforcement is GRANTED in part, DENIED in part.

APPENDIX D-2.

Opinion of the United States Court of Appeals for the District of Columbia Circuit in United Steelworkers of America, AFL-CIO v. NLRB, ... F. 2d ....., 75 LRRM 2790 (December 4, 1970).

Before BAZELON, *Chief Judge*, TAMM, *Circuit Judge*, and MATTHEWS,* *Senior Judge*.

TAMM, *C. J.*: Congress in enacting the National Labor Relations Act gave courts the power to review orders of the National Labor Relations Board (hereafter "the Board"). Findings with respect to questions of fact when supported by substantial evidence shall be left to the discretion of the Board. The Board, of course, is in a position neither to impose certain rules upon parties to a labor dispute while the proceedings are under way nor to abandon its impartiality in aid of one party or the other. In the instant case it would not be difficult for the Court to find in favor of the Union, nevertheless, based on the law we

* Sitting by designation pursuant to Title 28, U. S. Code, Section 292(a).

are compelled to disagree with the Board's decision to so find and we remand the dispute for further consideration.

The present controversy began when the United Steelworkers of America, AFL-CIO (hereafter "the Union") was certified on October 3, 1966, as the collective bargaining representative of the production and maintenance workers employed by Florida Machine and Foundry Company and Fleco Corporation (hereafter "the Company" or "the Employer"). The Union in due course submitted a contract proposal to the Company which then responded with a counter-proposal; these were analyzed and discussed at a number of negotiating sessions during which the position of each party emerged and began to take shape. After about five months of negotiation, however, the Union apparently despaired of succeeding through this channel and a strike was called for February 28, 1967. Meetings continued during the strike and the parties came closer to a contract, but meanwhile, the Company began to replace the striking workers and, before too long, the strike faltered. Less than five months after it had begun, the strike ended and the Union requested permission for its members to return to work. Thereafter, the Union filed charges with the Board alleging that the Company had violated the National Labor Relations Act by refusing to bargain with the Union in good faith in its effort to negotiate a contract acceptable to both parties. The Union also charged that the Employer wrongfully refused to reinstate employees who had struck in protest against the Employer's refusal to bargain in good faith.

A Trial Examiner presided over a hearing at which the parties introduced evidence and interrogated witnesses on the issues raised in the Union's charges. With a few exceptions not immediately relevant, the Board ratified the Trial Examiner's findings and accepted his conclusion that the Company had failed to bargain in good faith.

An order was issued instructing the Company to cease and desist from this behavior and to offer certain of the strikers immediate and full reinstatement to their former jobs. This was the background of the case as it came to us upon the Board's petition for enforcement of its order and the Union's appeal from a limited portion of the Board's order concerning the amount of back pay owed to reinstated employees. In view of our disposition of the former issue, we have not considered the latter since the question of back pay arises only after a finding that the Company violated its obligation to bargain in good faith. The errors into which the Board fell while making its decision cast sufficient doubt on that finding to require a remand for reconsideration in line with the observations which follow.

In drafting the order now before us, the Board relied primarily on the Trial Examiner's finding that the Employer had violated sections 8(a)(1) and 8(a)(5) of the National Labor Relations Act.[1] The Examiner summarized his conclusion as follows:

> I find upon the entire record that although the Company met with the Union and exchanged contract proposals, it did not bargain in good faith, as required by the Act, that is "with an open and fair mind, and a sincere purpose to find a basis of agreement touching wages and hours and conditions of labor."

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1. The relevant provisions of the Act are as follows:

§ 158. Unfair labor practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [section providing for collective bargaining]; . . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of [section setting out specific rights and obligations].

29 U. S. C. §§ 158(a)(1), (5) (1964).

(App. 40.) Since the Employer met with the Union and actively worked on contract proposals, it is necessary to take a very close look at the behavior of the Employer during negotiations and at its proposals before reaching the conclusion that the Employer had no desire to reach an agreement. Accordingly, the data which led the Examiner to a finding of bad faith is the quarry of the present search.

There is evidence in the record from which to conclude that the Employer was not acting in good faith. It was apparent, for example, that the Employer from the beginning had not wanted a union and had done its best to persuade the employees to vote against union representation. Even after the Union was certified as the collective bargaining agent, a residue of this antipathy remained; the Board agreed with the Examiner that there was evidence of this hostility toward the Union in the harshness of the contract terms the Employer proposed. Further support for the bad faith thesis was gained from the Employer's long delay in supplying data on which certain wage offers purportedly were based and from a refusal to provide certain information in the form requested by the Union. There was also evidence of an informal (and highly inappropriate) offer, on the eve of the strike, of a ten cent per hour raise for those workers who stayed on the job. Finally, there was at least some evidence from which to infer, as the Board did, that the Employer dragged its feet when urged by the Union to schedule frequent negotiating sessions.

The foregoing should make it clear that the record reflects no glory on this Employer; we are in no way tempted to commend the Company for its part in this proceeding. In the arguments to this court it is suggested that the Employer was motivated by a concern for the best interests of its employees and thought these best could be served without the intercession of a union. We are not so naive

as to accept such an obvious and juvenile misrepresentation.

At the same time it is well to point out that the negotiation of labor contracts is not a gentle art. Both labor and management have a great deal at stake when sitting down at a bargaining table and this is reflected in the language used and in the proposals advanced for consideration. This court and the Board each must remain aware of how difficult it is to capture the tone of such proceedings from an outside vantage point. What may appear to be an unreasonable, obdurate demand may be no more than the skillful practice of the negotiator's art, designed to wring concessions from the opposite side. Congress has excluded the Board from interfering in this process no matter how strongly it feels about the merits of the proposals under discussion.

Notwithstanding these reservations, it might appear that this court reaches the end of its tether in this area when it finds, as we have, that there is evidence in the record to support the Board's order. The cognoscenti might anticipate first a dutiful nod in the direction of "substantial evidence"—yet another attempt to trap that elusive butterfly with a net of mathematical precision. Ordinarily that would be our course, for we are neither inclined nor empowered to upset administrative findings which might be found to be based on substantial evidence in the record as a whole. *NLRB* v. *Herman Sausage Co.* [39 LC ¶ 66,253], 275 F. 2d 229, 231 (5th Cir. 1960). This is not the ordinary case, however, because we have detected several misconceptions entertained by the Board as to its proper role in this labor dispute. These errors may well have infected the process by which the Board found the Employer guilty of unfair labor practices and of a failure to bargain in good

faith; in fairness to the Employer, however reprehensible its behavior, we must remand the proceedings to the Board for reconsideration.

Subtle distinctions, such as between the correct and incorrect role of the Board in labor controversies, are difficult to ferret out of a record of substantial length; and, even if such first step succeeds, it is even more difficult to present a concise, composite picture of what is erroneous in contrast to what would have been correct. Nevertheless, that procedure is a present necessity and one in which we will begin with perhaps the most visible of the distinctions we hope to maintain.

Congress might well have given the Board power to determine the substantive terms of labor contracts, for the Board in the exercise of its expertise would be in a sound position to weigh the competing interests of the parties and to draft terms fair to both. As it happens, however, Congress explicitly reserved that power unto the parties themselves. *Porter Co.* v. *NLRB* [62 LC ¶ 10,696], 397 U. S. 99 (1970). The Board is authorized to oversee and enforce the duty of employer and union "to bargain collectively . . . in good faith," but Congress has made it clear that the obligation of good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession." 29 U. S. C. § 158(d) (1964). Since the statute involves no compulsion on either party to make a concession or agree to a proposal, then obviously the agency designated to execute the statute is without power to effect a similar compulsion. *NLRB* v. *American National Ins. Co.* [21 LC ¶ 66,980], 343 U. S. 395 (1952). Thus it is a fundamental proposition of labor law that the Board's power in this sphere is rigorously limited; in fact, Congress added section 8(d) to the Act precisely because "criticism of the Board's application of the [bargaining in good faith] test arose from the belief that [the Board] was forcing em-

ployers to yield to Union demands if they were to avoid a successful charge of unfair labor practice." *NLRB* v. *Insurance Agents* [39 LC ¶ 66,239], 361 U. S. 477, 486 (1960). *See also* H. R. Rep. No. 245, 80th Cong., 1st Sess. 19 (1947).

This leads us to the crux of the problem in the instant case. If we accept the proposition "that [section] 8(d) was an attempt by Congress to prevent the Board from controlling the settling of the terms of collective bargaining agreements" (*NLRB* v. *Insurance Agents*, *supra* [39 LC ¶ 66,239], 361 U. S. at 487), then we cannot give our approbation to the Board's finding that the Employer was guilty of bad faith bargaining if that finding is based on the fact that the Board did not approve of certain of the proposals advanced by the Employer in the course of negotiations. It appears, however, that this was the effect of the Board's adoption of the Examiner's finding that certain contract terms offered by the Employer were so inherently obnoxious to the best interests of the Union as to constitute evidence of bad faith and an unwillingness to come to agreement. The Examiner found that "[t]he Company proposed and insisted throughout the negotiations that the Union accept contract clauses which drastically curtailed the Union's representation rights." (App. 41.) In its decision the Board embraced this ruling without comment, although it did retreat to a limited extent from the implications submerged within it. For instance, the Board noted that it did not adopt the Examiner's conclusion that the Employer's refusal to agree to a term providing for compulsory arbitration and the Employer's concurrent proposal for a "no-strike" clause was, as a practical matter, an "insist[ence] that the Union virtually surrender its rights to strike without the usual 'quid pro quo of the compulsory arbitration of grievances.' " (App. 57.)

The Board, however, was not always so careful to observe the distinction between, on the one hand, a permissible inference of bad faith drawn from the proposals the Employer advanced and, on the other hand, an impermissible attempt to compel the Employer to accept certain terms or make certain concessions, an attempt in violation of section 8(d) of the Act. In its brief, for example, the Board urges that "[f]rom a substantive standpoint, . . . the Company's proposal was so disadvantageous to the employees as to call into question the Company's willingness to sign any agreement." (Brief for NLRB at 23.) After enumerating some of the heinous contract terms advanced by the Employer, the Board concludes, in virtually the same words the Examiner used:

> Since the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right to representation, its proffered contract was one which the Union could not possibly justify to the employees and hence frustrated rather than furthered collective bargaining.

(*Id.* at 24.)

We think that the second statement differs significantly from the first and that the Board there fell on the wrong side of the line dividing "permissible inference" from "impermissible compulsion." As to the first statement, it may be assumed for immediate purposes that the Board was on safe ground in examining a proposal and finding it "so disadvantageous . . . as to call into question the Company's willingness to sign any agreement." (*Id.* at 23.) We agree, as the Examiner found, that "good faith or its lack is a question of fact as to state of mind, and positions taken at the bargaining table, considered in the context of the whole

case, are manifestations of the state of mind with which negotiations are conducted." (App. 42.) Thus it would be legitimate for the Board to infer some degree of bad faith from the Company's insistence on a particularly disadvantageous proposal.

As to the second statement quoted above, however to the effect that one employer concession might "compensate" the employees for a concession they have made through their representatives, the Board is caught up with more than a mere inference as to the Employer's state of mind. Instead, the Board is dictating substantive negotiating terms in direct violation of section 8(d). When the Board bases a finding of bad faith on the fact that the Employer has not made a certain concession to the Union, then the Board is adding to the obligation of good faith bargaining a requirement that certain concessions be made. We cannot allow the Employer's obligation to be so altered.

This argument proceeds admittedly on a fine distinction, but the distinction was drawn not by us but by Congress and we have no alternative but to enforce it to the best of our ability. In so doing, we must rely as much on nuances in the Board's language as we would ordinarily rely on concrete facts; that is yet another reason why this kind of distinction is particularly difficult to articulate. We are not the first to approach this hurdle nor are we the first to point out the "tension between the principle that the parties need not contract on any specific terms and a practical enforcement of the principle that they are bound to deal with each other in a serious attempt to resolve differences and reach a common ground." *NLRB* v. *Insurance Agents* [39 LC ¶ 66,239], 361 U. S. 477, 486 (1960).

Having made these observations, we would prefer to be in a position to offer a clear set of guidelines for the Board's future use, but the nature of our power to review

does not allow us that prerogative. We hold merely that in the particular circumstances of this case the Board permitted its view on the merits of the substantive terms at issue between the parties to cloud its judgment of the Employer's good faith. See *Collins & Aikman Corp.* v. *NLRB* [58 LC ¶ 12,723], 395 F. 2d 277 (4th Cir. 1968). Thus the Board erred by adding to the Employer's obligation to bargain with the Union in good faith an obligation to concede to the Union demands for certain contractual terms. We discern ample support for our holding in the following passage from *Porter Co.* v. *NLRB* [62 LC ¶ 10,696], 397 U. S. 99, 107-08 (1970):

> It is implicit in the entire structure of the Act that the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties. . . . The Board's . . . powers . . . are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

(Footnotes omitted.)

A second example of our dissatisfaction with the Board's order involves the question of wages, one of the major areas of disagreement between the parties and important because in dealing with the problem the Board again misconceived its role. Because the issue of proposed wage increases will recur in virtually every labor dispute, it is particularly necessary that the Examiner and the Board

treat the problems arising in this area with consummate skill supported by a complete record and strictly in accord with both statutory requirements and judicial guidelines. In the instant case the Employer offered an across-the-board wage increase of 8 cents per hour and offered additional selective raises for certain specialized jobs. The Union began with a proposal for a 22 cents across-the-board raise but later reduced this figure first to 20 cents and then to 18 cents. In dealing with the parties' failure to come to agreement on this question, the Board adopted the Examiner's findings, which were as follows:

> As to wages, the Company initially rejected the Union's wage demands in their entirety on the ground that its wage rates were equal to or better than those in the Jacksonville area. Allegedly based on a new area survey, the Company on January 6, 1967, offered to increase the wages of several skilled job classifications to keep them in line with rates for comparable classifications in the area and, on January 25, it offered to increase shift differentials by 2 cents and give a general wage increase of 8 cents. The Company thereafter refused to supply the Union with area wage survey data. After the strike, on October 2, 1967, it unilaterally put its proposed wage increase into effect allegedly because it was at a "competitive disadvantage in the local labor market" and was not satisfied with "the calibre of applicants."

(App. 44.) The Examiner concluded that the Employer's wage offers amounted to "no more than 'surface bargaining' and were part of 'a purposeful strategy to make bargaining futile or fail.'" (*Id.*)

The Examiner also found that the Employer had made "no meaningful concessions on any major issue." (*Id.*) If the question of wages was a major issue, and it seems indisputable that it was, then the Examiner must have found that the Employer had made "no meaningful concession"

on wages. The Examiner therefore must have believed that a raise of 8 cents an hour was not meaningful and was an example of mere "surface bargaining." He of course is entitled to make this kind of finding and he is free to draw from it an inference of bad faith; but it is an elementary principle that the Examiner cannot do this without some evidence in the record to support his conclusion. We have sought in vain for such evidence. To the extent that the record sheds any illumination on this question it seems to support the contrary view that the wages already being paid were comparable to those offered by the other employers in the Jacksonville area. The following testimony by one of the Union's leaders is illustrative of that point:

> [Counsel for the Employer] ask[ed] us if we had checked the Jacksonville area rates, and I believe I advised him that was one of our major problems—by "our," the working people of—the Union, *that the Jacksonville rates were substandard.*
>
> And, [Counsel] said that the Company had to compete in the Jacksonville labor market, and they were paying a good wage.
>
> And, I asked him how he would compete—how he would compete more poorly if he gave raises, and I don't recall his answer to that.

(App. 421) (Emphasis added.)

From the absence in the record of any evidence on the exact wages being paid in the Jacksonville area, we are forced to conclude either that the Board assumed that the Employer's wage offer was not a meaningful concession or that the Board imposes an obligation on the Employer to produce evidence proving that its offer is meaningful and penalizes the Employer if it fails to produce such evidence. We have no way of knowing whether the 8 cent offer was "meaningful" by any objective standard, and it is not our function to speculate. Certainly we cannot draw any con-

clusion from the fact that the Union reduced its proposal from 22 cents to 18 cents whereas the Employer maintained his 8 cent offer; the Union, as a tactical move, may have begun with an extremely unrealistic figure while the Employer may have decided as a matter of bargaining strategy to begin with its maximum offer. We are in no position to rely on such speculation without evidence to support it, but neither is the Board entitled to speculate as it appears to have done here.

It might be argued that the lack of evidence in the record as to wages in the area of the Company was attributable to the Employer's failure to supply the Union with a requested wage survey. Although the record is not clear on this point, it appears possible that the wage survey which the Union requested was the survey relied on by the Employer in formulating raises for four specialized job classifications and not a survey which would throw light on the general wage increase with which we are now concerned. The survey covering the specialized jobs was supplied to the Union and is a part of the record, but it is not relevant to the more general problem. The question then becomes whether the Employer had a general obligation to supply evidence to support the reasonableness of its wage offer. We think that this is not the same question as is involved when an Employer has specific wage surveys which it uses while negotiating and yet refuses to provide to the Union. See *NLRB* v. *Acme Insurance Co.* [54 LC ¶ 11,639], 385 U. S. 432 (1967). Our objection is to the proposition, implicit in the Examiner's findings, that the Employer has a general obligation to prove that its wage proposal constitutes a meaningful concession whereas the Union has no such obligation. We see no justification in the statute for such a disparity in the burden of each party. In the absence of proof that the Employer has made wage surveys which it readily could make available to the Union, we hold

that the Examiner must solicit such information from the parties before he can make any finding on the reasonableness of either party's wage offer or conclude that either party's offer is evidence of bad faith.

The Board found two specific violations of the Employer's collective bargaining obligation, both of which involved information requested by the Union. The Employer was found to have delayed unreasonably in supplying a certain area wage rate survey, which has previously been discussed, and to have refused to supply certain other information accessible only to the Employer. Those findings and the conclusion that the strike was not an economic strike but rather was an unfair labor practice strike may or may not stand up after the Board's reconsideration of the issues already outlined. Since we think a re-evaluation of the entire controversy is required on remand, we think it best to postpone discussion of the Board's two specific findings until such time as it is necessary to take them up. Until the Board has reconsidered the questions presented by this opinion, we are not inclined to comment further on any other aspects of the proceedings. *Remanded for consideration consistent with the views expressed herein.*

BAZELON, *Ch. J.*, dissenting: I take no exception to the court's careful statement of the applicable principles of law. Congress has circumscribed the Board's activities in this area with a fine hand, permitting the Board to infer bad faith from particular contract proposals, but prohibiting the Board from dictating any substantive terms of the contract. In practice, the distinction is often difficult to draw. I cannot agree, however, that in this case the Board's action falls on the prohibited side of the line.

The court concludes that the Board in effect required the Employer to make "certain concessions" to the Union. The nature of those concessions is not specified in the opinion of this court, nor is it apparent from the record of the proceedings below.[1] To support its conclusion that the Board acted improperly, the court relies heavily on a single sentence in the Trial Examiner's decision, implicitly adopted in the decision of the Board, and quoted by the Board in its brief on appeal. The Examiner stated that "the Company included in its proposals no improvements in existing conditions of employment which might compensate the employees for this sweeping relinquishment by the Union of their right of representation. . . ." In my view, that statement does not require the Company to make particular concessions. It merely reflects the finding, approved by the court, that the Company's proposal was highly disadvantageous to the Union. The Board relied heavily on the overall tenor of the Employer's contract proposals to support the inference of bad faith, but it did not require alteration of any particular contract term.

With respect to the single issue of wages, it seems to me that the court misconstrues the position of the Board. The

1. The Trial Examiner's decision might be read to require a provision for compulsory arbitration, but the Board expressly rejected that part of his decision, as the court notes with approval, p. 8 *supra*.

opinion effectively attacks the proposition that the Employer made no meaningful concession on wages. But the Examiner did not deny that the Employer's wage offers constituted concessions. He found, rather, that "under all the circumstances," presumably including the Employer's position on other issues, those wage concessions "amounted to no more than 'surface bargaining' and were part of 'a purposeful strategy to make bargaining futile or fail.'" The Board's inference of bad faith was based on the totality of the Employer's position, and not his position on any single contract provision. See *NLRB* v. *Truitt Mfg. Co.* [30 LC ¶ 69,932], 351 U. S. 149, 155 (1956) (Frankfurter, *J.*, concurring and dissenting); *Local 833, UAW* v. *NLRB*, 112 U. S. App. D. C. 107, 114-15 [44 LC ¶ 17,403], 300 F. 2d 699, 706-07, *cert. denied* [45 LC ¶ 17,648], 370 U. S. 911 (1962).

The Employer's contract proposals considered as a whole, together with other factors enumerated by the majority, provide ample evidence from which the Board could find a failure to bargain in good faith. For that reason I would enforce the order of the Board.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1291

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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IN THE

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KELLWOOD COMPANY, OTTENHEIMER DIVISION,
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vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner, Kellwood Company, Ottenheimer Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on December 28, 1970.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix B-1, pp. A3-A11) is not yet officially reported. The National Labor Relations Board's decision and order (Appendix C-1, pp. A17-A18) is reported at 178 NLRB No. 6.

JURISDICTION.

The judgment of the Court of Appeals for the Eighth Circuit (Appendix B-2, pp. A12-A15) was entered on December 23, 1970. A timely petition for rehearing en banc was denied on December 23, 1970 (Appendix B-3, p. A16) and this petition for certiorari was filed within ninety days of that date. A thirty day stay of the Court of Appeals' judgment has been granted to permit the filing of this petition. Appendix B-4, p. A16. This Court's jurisdiction is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED.

1. Does the National Labor Relations Board have the power, in determining whether a party has bargained in good faith within the meaning of 29 U. S. C. Section 158(d), to promulgate standards with respect to bargaining techniques, attitudes and approaches?

2. May an overall refusal to bargain in good faith be found where (a) there has been a good faith acceptance of an offer for a final and binding agreement and (b) where the refusal to bargain is predicated substantially on various acts found to have "embarrassed" and "denigrated" the other party?

STATUTES INVOLVED.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C. Sec. 151, *et seq.*), which are involved in this case are set forth in Appendix A. For the convenience of the Court, the pertinent provisions of Section 8(d) of the Act are set forth below:

> "For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees

to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." (emphasis added).

STATEMENT OF THE CASE.

This is *not* a case where there has been a failure to negotiate in *fact* for a collective bargaining agreement. The issue is instead the far more perplexing one of whether, despite exhaustive and complex negotiations and, at one point, even an assumed final agreement, the National Labor Relations Board may nevertheless evaluate a party's bargaining tactics and conclude that there has been an overall absence of good faith bargaining.

The factual situation involved is not atypical in the current American industrial scene: the lengthy and difficult, frequently abrasive, negotiation for an initial collective bargaining agreement. The bargaining unit consists of approximately 1200 production and maintenance employees, represented by Respondent International Ladies' Garment Workers Union (herein called the "Union"), at Petitioner's (herein called the "Company") Little Rock, Arkansas, facilities. The negotiations occurred during a period of some twenty months, including a thirteen month strike, and consisted of some thirty separate bargaining meetings, both formal and informal. The crux of the case, however, are those events which occurred during the pre-strike bargaining period of March to October, 1962.[1]

Initially, in a series of meetings from March through June, agreement was reached on a multitude of non-eco-

1. The other pre-strike unfair labor practices enforced by the court below are collateral to and derivative from the finding of overall bad faith bargaining. Thus, the previously-approved settlement agreement with respect to pre-election campaign unfair labor practices was set aside because "the Company violated this agreement by bargaining in bad faith" (Appendix C-2, p. A91);

nomic items. By July 19, there was general agreement on the framework of a collective bargaining contract, the parties had exchanged and discussed proposals on all bargaining issues, and there remained but seventeen issues unresolved. At the next meeting, held in St. Louis on September 22 between the President of the International Union and the Chairman of the Board of the Company, through a process of admitted "give and take by both parties," the number of issues in dispute was reduced from seventeen to three: wages, an escalator or cost-of-living clause, and whether piece rates would be subject to arbitration. The Union had also injected an additional issue by reinstating its demand for a picket line clause. These items were in turn to be resolved at a second summit meeting to be held in New York on September 29. Appendix C-2, pp. A44-A49, A57-A62.

The September 29 meeting did result in what, at least to the Company, was a final and binding agreement. The Company proposed that it would agree to the Union's wage proposal if the Union would withdraw the other three controverted items. The Union responded, after discussion, that it would withdraw its non-wage demands in return for a two-year contract rather than the three-year agreement which had been under discussion. The Company then caucused and, upon its completion, replied to the Union President, "You have a contract, Mr. Stulberg." It soon became apparent, however, that there was a misunderstand-

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the strike was found to be an unfair labor practice, rather than economically motivated, strike because it flowed from the Company's "general lack of good-faith bargaining" (Appendix C-2, pp. A94-A95); and the Company's implementation of a wage increase on October 25 was condemned because it was also, in the language of the court below, part of the Company's single-minded "strategy to force a 'collision course' and obstruct bargaining." Appendix B-1, p. A11. Accordingly, the "basic issue", as the Eighth Circuit concluded, "surrounds the §8(a)(5) violation as it relates to the company's good faith in bargaining." Appendix B-1, p. A6.

ing as to the timing of the wage proposal, that it was not that which the Company had understood, and that there still was no final and complete agreement. Appendix C-2, pp. A63-A66.

Notwithstanding the aborted agreement of September 29, it was recognized that, through the numerous concessions and adjustments that had been made by both parties, the negotiations had reached the point where only an understanding on wages precluded a complete agreement. On October 6, the Company sought to resolve this difference by increasing its wage proposal and making a final offer at the midpoint of the parties' conflicting interpretations of the Union's wage proposal. This new proposal narrowed the difference separating the parties to only five cents per hour for each of two six-month periods in a three year agreement.[2] Appendix C-2, pp. A67-A69.

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2. In chart form, the wage proposals of the parties are set forth below. For convenience, wages are stated in terms of minimum guarantees, rather than the employees' base rate which would have been 27½¢ higher:

	Proposals	Date	Effective Date of Contract	3-1-67	6-1-67	2-1-68	6-16-68
1.	Union	4-13-66	1.50	1.50	no proposal	no proposal	no proposal
2.	Company	6-22-66	1.30	1.60	1.45	1.60	1.65
3.	Company	7-19-66	1.35	1.60	1.45	1.60	1.65
4.	Union	8-16-66	1.45	1.65	1.55	1.60	1.70
5.	Union	8-29-66	1.60	1.60	1.50	1.60	1.70
6.	Union (as understood)	9-22-66	1.35	1.60	1.50	1.60	1.70
7.	Company (acceptance of "proposal")	9-29-66	1.35	1.60	1.50	1.60	1.70
8.	Union (as "explained")	9-29-66	1.35	1.50	1.50	1.70	1.70
9.	Company's final proposal	10- 6-66	1.35	1.45	1.50	1.65	1.70
10.	Union	no proposal prior to strike					

On October 10, the Union refused this offer and also declined to make a counter-proposal. When pressed for the basis of its refusal, the Union would not discuss it and stated only that the parties must return to the bargaining table. Appendix C-2, pp. A69-A70.

The final pre-strike meeting occurred on October 24. The Company sought to present its final offer of October 6 to the employee negotiating committee which had not been present at the four previous meetings. The Union's vice president replied that such a presentation would be futile, that the offer had already been flatly refused, and that the employees had voted to strike. When asked what separated the parties, his only response was "the people and a decent offer from the Company." The Company representatives left the meeting with a statement by its negotiator: "I only hope the 1600 people know what separates us: a nickel for two six-month periods." Appendix C-2, pp. A76-A78.

The strike commenced the following day and continued until November 22, 1967. Only two subsequent negotiation meetings occurred thereafter—both at the insistence of government mediators and both proved to be unsuccessful. On December 5, 1967, some five months after all strikers had been replaced, the Company withdrew its recognition of the Union on the ground, inter alia, that it no longer represented a majority of the employees in the bargaining unit. Appendix C-2, pp. A112-112, A119.

The decision below concluded that, notwithstanding this lengthy and difficult series of first negotiations, which at one point had even resulted in a [illegible] executed final agreement, the Company had engaged in an overall pattern of bad faith bargaining. This conclusion was predicated primarily on the presumption that the Company's bargaining tactics and strategy had "embarrass[ed]" and "undetermine[d]" the Union in the eyes of the employees. It is

upon this issue—whether the Board may intrude to such a substantial degree in the collective bargaining process—that certiorari is now sought.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Raises an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

The resolution of industrial disputes through free collective bargaining, absent governmental regulation of its terms, is the cornerstone upon which our national labor policy rests. *H. K. Porter Company v. N. L. R. B.*, 397 U. S. 99, 25 L. Ed. 2d 146, 151 (1970). Yet the myriad problems attendant upon such resolution continue to grow in both frequency and complexity.[3] Contractual negotiations in the public as well as the private sector[4]—and the industrial

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3. In fiscal year 1969, 2372 employer refusal to bargain charges were filed with the Board—21.6% of all charges filed against employers. Thirty-Fourth Annual Report of the National Labor Relations Board, p. 199. By comparison, in fiscal year 1936 the total of all charges filed with the Board was 2014. Fourth Annual Report of the National Labor Relations Board, p. 30. The complexity of such charges, and the resultant need for this Court to establish the controlling guidelines, was recently well stated by the Fifth Circuit: "... in few other instances is the task of judging as difficult as in the refusal to bargain case, where the factors are subtle and elusive, and conduct which at one time may be manifest good faith may, under other circumstances, be mere pretense." *H. R. & R. Trucking Co. v. N. L. R. B.*, ... F. 2d ..., 75 LRRM 2705, 2705-6 (Nov. 26, 1970); Appendix D-1, p. A125.

4. There are approximately 150,000 collective bargaining agreements presently in force. Directory of National and International Labor Unions in the United States, 1969, Bulletin 165 (Bureau of Labor Statistics, 1969). And this figure does not fully reflect the burgeoning growth of collective bargaining in the sensitive area of public employees. See, e.g., Assembly, Labor Problems in the 70's, 1970 Report of the American Bar Association's Section of Labor Relations Law, 74 LRRM 201, 202 (1970). Each of these contracts, of course, is periodically subject to replacement, renewal

strife engendered thereby[5]—remain matters of paramount concern throughout the nation.

One significant contributant to the problem is the undefined role of the National Labor Relations Board in adjudicating bargaining techniques and bargaining conduct. For example, where, as in this case, exhaustive negotiations virtually achieve agreement but fail to result in complete accord, as Chief Justice (then Judge) Burger has observed,[6] the test of legality must be "whether, in light of all the circumstances of the negotiation, there is evidence of a calculated effort to frustrate agreement *generally*" (emphasis Chief Justice Burger's). But does such an inquiry permit the Board, as it did here, to look over the negotiator's shoulders and virtually take a seat at the bargaining table? May the Board find, as here, a desire to frustrate agreement when there actually has been a *bona fide* acceptance of the other party's offer? May an effort to frustrate agreement be implied, as in this case, from pre-election statements made a considerable period earlier, or from the Company's general attitude toward unions, or, indeed, from a bargaining stance which may embarrass or denigrate the other party? These questions, all of critical importance in the administration of the National Labor Relations Act, remain in controversy and unresolved by this Court.

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or modification. In fiscal year 1970, for example, the Federal Mediation and Conciliation Service received 101,474 dispute notices under Section 8(d)(3) of the Act. Twenty-Third Annual Report of the Federal Mediation and Conciliation Service.

5. In 1969, there were a record 5,700 recorded work stoppages involving nearly 2.5 million workers. Work Stoppages in 1969, U. S. Department of Labor, Summary Report, June, 1970. In 1970, there were 5,600 work stoppages involving 3.3 million workers. Press Release, USDL 71-004 (Bureau of Labor Statistics, January 11, 1971).

6. *United Steelworkers of America* v. *N. L. R. B. (Roanoke Iron & Bridge Works, Inc.)*, 390 F. 2d 847, 853 (D. C. Cir. 1967), *cert. den.*, 391 U. S. 804 (1968) (dissenting opinion).

The instant case provides an appropriate vehicle to resolve such controversy. It places in more precise focus, through a stronger factual context, the problems which divided the courts in *Roanoke Iron* and *N. L. R. B.* v. *General Electric Co.*, 418 F. 2d 736 (2nd Cir. 1969), *cert. den.*, 397 U. S. 965 (1970)—the only previous decisions in the history of the National Labor Relations Act which approved a finding of overall bad faith despite a manifested desire to reach agreement. It permits the Court to examine the Board's position, now approved by the Eighth Circuit, that an employer engages in bad faith bargaining when he deprecates the union with which he is negotiating —a position which, as Judge Friendly observed in his dissent in *General Electric*, finds no warrant "in the language of the statute, its legislative history or decisions construing it." 418 F. 2d at 770. In sum, it permits this Court to establish guidelines as to the Board's responsibilities in an area of vital concern to management, labor and the public alike.

2. The Decision Below Is in Conflict With the Decisions of This Court.

This Court has repeatedly emphasized the rigorous limitations imposed upon the Board in evaluating collective bargaining. In last year's *Porter* decision the Court admonished once again that the Board may not "impose its own views of a desirable settlement" or "directly or indirectly . . . sit in judgment upon the substantive terms of collective bargaining agreements" or "compel agreement when the parties themselves are unable to do so." 25 L. Ed. 2d at 151, 152, 153. The dissenting opinion of Mr. Justices Douglas and Stewart similarly observed that "once there is any business consideration that leads to a denial of a demand or any consideration of bargaining

strategy that explains the refusal, the Board has no power to act. Its power is narrowly restricted to the clear case where the refusal is aimed solely at avoidance of any agreement." 25 L. Ed. 2d at 155.[7]

The Eighth Circuit sanctions here a finding of bad faith, based solely on the failure to manifest "sincerity to work for an agreement," while concomitantly it finds a "good faith" acceptance of the other party's proposal. Appendix B-1, p. A6. But if actual acceptance of the other party's proposal is not the key to good faith, then what is? The answer of the court below is apparent from its decision: if bargaining tactics and attitudes make one party appear "ineffective," or "embarrass" or "denigrate" that party, then there has been bad faith bargaining. Appendix B-1, pp. A7-A9.

Such a proposition is, indeed, as Mr. Chief Justice (then Judge) Burger observed in his dissent in *Roanoke*, "novel and internally inconsistent." 390 F. 2d at 853. And the court's countenancing of the arrogation on the part of the Board of the role of regulator of bargaining strategy necessarily condones the Board's entrance into the substantive aspects of the bargaining process. See *Insurance Agents International Union*, 361 U. S. at 489-90. The Board's role is only to "oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Porter*, 25 L. Ed. 2d at 153. "For the government to tell the parties how they must conduct themselves in collective bargaining negotiations," as Professor Cox has observed, "would seem to lead inevitably to weighting the scales in favor of one side or the other, for tactical maneuvers in-

7. See also *N. L. R. B.* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 45 (1937); *N. L. R. B.* v. *American National Ins. Co.*, 343 U. S. 395, 404 (1952); and *N. L. R. B.* v. *Insurance Agents International Union*, 361 U. S. 477 (1960).

finance the process of persuasion especially where economic power is a primary factor."[8]

Board regulation of bargaining techniques and attitudes does not permit the bargaining strengths of the parties, as often reflected in the tough and even unreasonable posture of their negotiators, to determine "the results of the contest." "If it is necessary," to quote *Porter*, "to allow governmental review of proposals for collective bargaining agreements," then this surely "is the job of Congress, not the Board or the courts." 25 L. Ed. 2d at 154.

3. The Decision Below Is in Conflict With the Decisions of Other Courts of Appeal on the Same Question.

The necessity for this Court to delineate the Board's role in assessing overall good faith where bargaining has, in fact, occurred is emphasized by the considerable conflict between the instant case and two other significant Court of Appeals decisions issued at approximately the same time: *M. R. & R. Trucking Co.* v. *N. L. R. B.*, ____ F. 2d ____, 75 LRRM 2705 (5th Cir. Nov. 24, 1970), Appendix D-1 (A134-A148); and *United Steelworkers of America* v. *N. L. R. B. (Florida Machine & Foundry Co.)*, ____ F. 2d ____, 75 LRRM 2790 (D. C. Cir. Dec. 4, 1970), Appendix D-2 (A148-A163). The continued existence of such different rules on this important issue in labor management relations impairs the uniformity of national labor policy that the Act was designed to achieve. Cf. *Garner* v. *Teamsters Union*, 346 U. S. 485, 490-491 (1953).

Several examples will illustrate the confusion, and conflicting concept of the Board's role, which presently abounds:

A. In *Florida Machine*, the court observed that, since

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8. Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1440 (1958).

"the Employer from the beginning had not wanted a union and had done its best to persuade the employees to vote against union representation," it was obvious that "a residue of this antipathy remained." 75 LRRM at 2702; Appendix D-2, p. A151. Similarly, in *M. R. & R.* the court recognized that the bargaining there was necessarily influenced by the recertification election which had occurred during the midst of negotiation and that, as a result, the case was "one of hard-nosed bargaining from both sides of the table, and use by both company and union of naked power." 75 LRRM at 2706; Appendix D-1, p. A136. Yet neither court attributed any overriding significance to so common a prelude to negotiations.

By contrast, here the Company's general opposition to unionization, its statements during a pre-election campaign two years prior, and even its conduct at another plant where the employees were not represented by the Union,[9] are all invoked as the "touchstone" to demonstrate the "impossib[ility]" that the Company could subsequently bargain with a "sincere desire to reach an agreement." Appendix B-1, pp. A7-A9; Appendix C-2, pp. A82-A84.

B. The Board in *M. R. & R.*, as here, minutely analyzed the timing and content of the employer's bargaining proposals and found them in part to be "so unpalatable to the union that the offer was an illusory one" and one "to which no self respecting union could agree." 75 LRRM 2707, 2708; Appendix D-1; pp. A139, A142, n. 7. The Fifth Circuit, however, *rejected* this approach, noting, first, that

9. The Company's Loraine plant is admittedly "not involved in this litigation" (Appendix B-2, p. A4) and the Company-wide wage increase granted the employees at that plant, although a point stressed by both the Board and the court below (Appendix B-1, pp. A7-A8; Appendix C-2, pp. A49-A55, A84), is one which has already been held *not* to be a violation of the Act by two Courts of Appeal. *Kellwood Co., Ottenheimer Bros. Mfg. Co.* v. *N. L. R. B.*, 411 F. 2d 493 (8th Cir. 1969); *Southern Foundation* v. *N. L. R. B.*, 406 F. 2d 1063 (6th Cir. 1968).

the union there had considered the various proposals and made counter-proposals, and, second, that even assuming *arguendo* "a party's proposal may be so extreme or bizarre as to give rise to an inference of bad faith . . . such a principle, if accepted at all, must be narrowly restricted, otherwise it imperminissibly undermines the policy of Section 8(d) of the Act." 75 LRRM at 2708, n. 7; Appendix D-1, p. A142, n. 7. The District of Columbia Circuit in *Florida Machine* similarly criticized the Board for finding that an employer's proposal "was one which the Union could not possibly justify to the employees and hence frustrated rather than furthered collective bargaining." 75 LRRM at 2794; Appendix D-2, p. A155.

By contrast, here the Company's bargaining tactics are specifically condemned because they "undermine[d] the Union in its effort to get an *acceptable* contract for the employees without a strike," (Appendix C-2, p. A86; emphasis added) or, because, in the language of the Eighth Circuit, they made it appear the Union was "ineffective" and "embarrass[ed]" and "denigrate[d] the union in the eyes of its members." Appendix B-1, pp. A7, A8. Indeed, neither Board nor court disavow the Trial Examiner's reliance on the Company's *proposal* with respect to limiting the Union's right to strike (Appendix C-2, pp. A88-A90)—a clear indication, as the court recognized with respect to a similar proposal in *Florida Machine*, that the finding of bad faith was influenced by "the fact that the Board did not approve of certain of the proposals advanced by the Employer during the course of negotiations." 75 LRRM at 2793; Appendix D-2, p. A154.

C. "Both labor and management," as the court emphasized in *Florida Machine*, "have a great deal at stake when sitting down at the bargaining table . . ." 75 LRRM at 2792; Appendix D-2, p. A152. "It is not for the Board to balance the scales or equalize or neutralize pressures in

the name of good faith. Collective bargaining is, by its very nature, 'an annealing process hammered out under the most severe and competing forces and counteracting pressures.'" *M. R. & R.*, 75 LRRM at 2710; Appendix D-1, p. A166.

By contrast, here the Eighth Circuit approves a far different approach to collective bargaining. Notwithstanding the "great deal" at stake to the Company and the numerous "competing forces and counteracting pressures" that were at work in the instant negotiations, the Company's admittedly non-coercive communication to its employees on October 18, designed to apprise them of its prior final offer and to urge them to advocate its acceptance at a Union meeting, is censored because it was made without consultation with the Union, because it did not cover every aspect of the Company's total proposal and because "it was for the Union to decide when to tell the employees about [that Company's] offer." Appendix B-1, pp. A8, A10; Appendix C-2, pp. A72-73.[10]

D. In *M. R. & R.*, the principal Board errors found by the court were (1) restricting "the right of the company to use the stronger bargaining position in which it found itself" and (2) treating the "actions of the company as though existent in isolation." 75 LRRM at 2709; Appendix D-1, pp. A144-A145. Similarly, the deficiency of the Board's decision found by the court in *Florida Machine* was

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10. *Cf., e.g.*, the assertion of the majority opinion in *General Electric* that a "company, of course, can advertise its belief that its offer is fair, and that at the particular time, it sees no reason to change its offer even to forestall a strike." 218 F. 2d at 762. *See also Thomas v. Collins*, 323 U. S. 516, 532, 537-8 (1945); *Linn v. Plant Guard Workers*, 383 U. S. 53, 62 (1966) ("... debate on issues dividing labor and management should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks"); and Section 8(c) of the Act which draws no distinction between pre-election and post-election communications.

its assumption that the employer's wage proposal was not "meaningful" and the resultant imposition of an obligation on the company to produce evidence to prove to the contrary. 75 LRRM at 2795; Appendix D-2, pp. A159-A161.

By contrast, here the court finds the Company to have engaged in "shadow bargaining" because it offered minimum guarantees "no more than the anticipated federal minimum wage increases". Appendix B-2, p. A9. The court enforces a Board decision which ignores numerous indicia of the Company's good faith—(a) its repeated "give and take"; (b) its frequent proffer of counter-proposals; (c) its agreement with the Union on all non-economic matters; (d) its concessions on such costly economic items as a new pension plan, improvements in hospital and surgical insurance, accident and sickness benefits, life insurance and a new holiday;[11] and (e) its narrowing of the disputed items so that, ultimately, only five cents in wages really separated the parties. And finally, the court sanctions the Board's crucial and mistaken premise that "(b)argaining in good faith requires bargaining on *every* issue, especially with a *newly certified* union on a *first* wage increase." Appendix C-2, p. A84 (emphasis the Board's). In effect, since there was no other area of dispute, the Eighth Circuit has required the Company to *agree* to the Union's wage proposal.

The utilization by the Board, with court approval here, of each of the foregoing factors necessarily has a serious and widespread unsettling effect on both management and labor. It demonstrates that the Board has adopted, now with the approval of the Eighth Circuit, a novel and dangerous approach to collective bargaining. This new

11. *Cf., e.g.*, the majority opinion in *General Electric* which declared that while "the absence of concessions would not prove bad faith, their presence would . . . raise a strong inference of good faith." 418 F. 2d at 758.

approach is also evident in the Board's decisions in *M. R. & R.* and *Florida Machine*. Surely the fears expressed by Professor Archibald Cox thirteen years ago—that "the NLRB may come to condemn any conduct which sharply departs from good bargaining practice"—have been rekindled.[12]

The compelling necessity to allay these legitimate concerns argues forcefully for review of the present case by this Court.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

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12. Cox, *supra* n. 8, at 1403.

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No. 1291

SUPREME COURT OF THE UNITED STATES

October Term, 1970

KELLWOOD COMPANY, OTTENHEIMER DIVISION, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD and INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Respondents*

Brief for International Ladies' Garment Workers' Union, AFL-CIO, in Opposition to a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

INTRODUCTION

The respondent International Ladies' Garment Workers' Union adopts the statements of Opinions Below, Jurisdiction, Statute Involved, and Statement set forth in the Brief for the National Labor Relations Board in Opposition.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether this Court should review a factual determination of the National Labor Relations Board that the employer bargained in bad faith and with a fixed in-

tention to obstruct rather than to reach agreement with the union, where the Court of Appeals concluded not merely that there was substantial evidence to support that determination bŭt that it "is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board."

REASONS FOR DENYING THE WRIT

1. Evidence of Bad Faith Bargaining by the Kellwood Company is Overwhelming.

As the Trial Examiner, the National Labor Relations Board, and the United States Court of Appeals all recognized unanimously, there is massive evidence in these extensive proceedings which compels a finding of bad faith bargaining by the petitioner Kellwood Company.

This is not a case in which the Court of Appeals merely deferred to the expertise of the NLRB, or felt constrained by the substantial evidence standards of *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). The opinion of the court demonstrates much more: a repeated conviction that the Board was right in coming to its broad (and detailed) conclusions.

> We have little difficulty with this record in holding that there exists sufficient evidence to sustain the Board's finding of § 8(a)(5) bad faith. A9.
>
> . . . .
>
> We have no difficulty on this record in resolving that there have been violations of § 8(a)(1), (3) and (5), more fully described by the Board, and that the Board's order should be enforced as herein modified. A10.
>
> . . . .

> It is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board. There existed obvious [Kellwood] strategy to force a "collision course" and obstruct bargaining. The company succeeded in what it set out to do. A11.

With amply supported conclusions of this kind by every tribunal in this case as background, it is manifest that there is substantial evidence on the record as a whole to justify the order of the NLRB.

It is not easy to abstract concise facts from thousands of pages of testimony and exhibits for the limited function of this opposition. What is present here, in sum, is employer bad faith characterized by the hostility of the 1930s and applied with the sophistication of the 1960s.

The record is replete with evidence of employer statements making plain to the employees that selection of a union would not—and could not—result in a collective bargaining agreement. See, *e.g.*, A24-A36. A pre-bargaining speech by a major Kellwood official declaimed, for example:

> The truth is—if the union should be voted in, the Company would be required to bargain with the union, but the Company would NOT be required to agree to any union demand. The Company still would not have to sign the union's contract. The Company could still say NO to the union. If no agreement was reached, there would be no contract.
>
> . . . .
>
> One other thing—ask the union what happens to employees when they vote for the union in an election and then the company and the union *never* reach an agreement and *never sign* a contract. G.C. Ex. 114. (Emphasis in original.)

However correct as sterile statements of the law such announcements might be, when they are repeatedly stated and interspersed with threats, promises, and interrogation which violate Section 8(a)(1) of the Act (see, *e.g.*, A91-A92), they clearly contribute to substantial evidence of a bad faith state of mind.

Such campaign was conducted by employer officials from the President of Kellwood to first line supervisors: selection of the union will surely result in failure to agree on a contract, which will surely result in a strike, which will surely result in loss of jobs for employees.

It was true. Selection of the union did result in failure to agree on a contract, a strike, and, without the Board decision in this case, loss of jobs for the employees. The no-contract "predictions" became reality by the conduct of the employer at the bargaining table. *Cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

At each juncture of the relationship, calculated employer acts destroyed possibility of agreement. There was appearance of conviviality, for example, in informal meetings between the top negotiators for the parties during June and July, 1966. Isolation of the major issues, traditionally a preclude to agreement, began. But the employer made sure the union could not come to agreement by (1) deciding in May to offer a critical ten cent wage increase for the Little Rock Kellwood plant, (2) announcing it on July 18 to employees at all the rest of its 36 plant chain (all nonunion), and (3) *then* "offering" it to the union for the Little Rock plant in issue. See *e.g.*, A48-A57.

There is nothing wrong, on the face of it, with giving increases at nonunion plants. There is nothing in the law that requires an employer to offer unionized employees more than nonunion employees. But the sequence of this May-July conduct by Kellwood could not have been developed with more cunning disparagement. By the sim-

plest procedure: offering the ten cents to the union at the bargaining table *before* announcing its August 1 effectiveness at the nonunion plants, for example, the status of the union as a bargainer would not have been so impaired.

Similarly, when the union was able to build back from this undercutting (see, *e.g.*, A57-A59) and agreement again seemed possible, in September the employer intentionally confused communication so that there could be no "meeting of the minds." See, *e.g.*, A64-A65. If, as the employer argues, there was merely misunderstanding, that misunderstanding could have been cleared up by simple requests for explanation, requests that the employer chose not to make. When explanation was offered, it was ignored.

When the final crisis approached, the employer communicated directly with the employees, telling them that the union was deceiving them about the status of the negotiations. A copy of the letter was not even sent to the union. See, *e.g.*, A70-A73.

The denouement, compelling the conclusion that the employer was "negotiating" to provoke a self-destructive strike rather than a contract, occurred in late October. By a letter to the employees on October 18, the employer advised that the union had *until October 28* in which to accept its "final offer." On October 24, four days before the deadline the employer itself had set, it issued another letter to the employees *and not to the union*, announcing that it was placing into effect, immediately and unilaterally, the terms of that offer. See, *e.g.*, A77-A80. A strike followed the next day.

To be sure, an employer has a legal right to grant an increase unilaterally *if good faith* negotiations have created an impasse. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217 (1949). But if an impasse existed on October 24, 1966, it was not the result of good faith bar-

gaining by this employer. The very mechanics of the announcement reveal its true character as a device to disparage and undermine the union: (1) the employer never told the union it was going to take such action so that it would have an opportunity to agree to it in the face of its impendence, (2) the employer announced the increase to the employees without even sending the union a copy of the announcement letter, and (3) no impasse could have existed before the *October 28* deadline which the employer already had given, by which date the union could have accepted the "final offer."

It is hard to imagine conduct more calculated to undermine the union, more frustrating to negotiations, more surely resulting in a destructive strike, or in more damaging bad faith. It is evidence of the most substantial kind to support the basic NLRB conclusions.

The petitioner stresses, as it did before the Board, that many bargaining meetings were held and "concessions" were made. But meetings themselves can show merely that the employer is cleverly avoiding *per se* infirmities in its conduct. And concessions no more establish good faith than absence of concessions establishes bad faith. Further, in nearly every instance, the purported concessions represented either established practice at the Little Rock Kellwood operations, or changes which had been decided on and/or installed previously at all other plants of the Kellwood chain. Neither compels characterization as the fruit—or even significant evidence—of good faith bargaining.

2. The Petition Misrepresents Important Aspects of These Proceedings.

There are portions of the Petition for a Writ of Certiorari which go beyond customary legal advocacy.

For example, on page seven of the Petition, as part of its Statement of the Case, Kellwood asserts:

> The decision below concluded that, notwithstanding this lengthy and difficult series of first negotiations, which at one point had even resulted in a *bona fide* assumed final agreement, the Company had engaged in an overall pattern of bad faith bargaining.

The petitioner than "reasons," at page ten:

> The Eighth Circuit sanctions here a finding of bad faith, based solely on the failure to manifest "sincerity to work for an agreement," while concomitantly it finds a "good faith" acceptance of the other party's proposal.

Statements of the Trial Examiner about the "agreement" to which the Petition so refers include the following:

> Of a certainty, there was no meeting of the minds in New York, even for a split second . . . If there was any trickery, the entire record, including [Kellwood's] anti-union pre-election campaign, suggests that it was more apt to have come from the Company than the Union, in an effort to contrive seeming agreement on wages it knew the Union did not intend and which foreseeably would be repudiated by the Union; thus casting a shadow upon the Union's bargaining and putting itself in the clear of a bad-faith bargaining allegation. A64-A65.

The Court of Appeals dealt directly with the point.

> The examiner found the "acceptance" "was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process." The examiner's conclusion is challenged. *Assuming, solely for the sake of argument, there existed a good faith misunderstanding in the "acceptance" of the company, there are too many other factors which weigh against the company's contention of good faith bargaining.* A6. (Emphasis added.)

By no stretch of the imagination can these or other observations support assertions that a decision below concluded that there had been a "*bona fide* assumed final agreement."

A second example of (at least) misdirected argument is contained at page twelve, note nine, of the Petition. Kellwood there claims that although two Courts of Appeal held a particular wage increase not to be a violation of the Act, both the Board and the court below relied on that increase.

In fact, to the contrary, the Eighth Circuit previously had found the "timing, the content and the manner of [the same] wage increase announcement" by the employer to be a violation of Section 8(a)(1) of the Act. *Kellwood Co., Ottenheimer Division v. NLRB*, 411 F.2d 493 (8th Cir. 1969). In its decision in the instant case, at the pages cited by the Petition, the court does no more than discuss the same announcement. Thus it is deceptive, to say the least, to assert that the court below "stressed" the granting of an increase which had been found not to be a violation of the Act in other cases.

If such particulars in the Petition are inaccurate, its generalities are susceptible to the deepest suspicion.

Finally, an attempt to create a "conflict" among circuits coming to "different" conclusions about Section 8(a)(5) violations ignores the essentially factual nature of the determinations involved. Subsequent to the decision relied on by the petitioner, for example, the Fifth Circuit issued *Sweeney & Co. v. NLRB*, ... F.2d ..., 76 L.R.R.M. 2321 (5th Cir. 1971), one of a "plethora of judicial decisions" involving, "in final analysis, the motives of the parties manifested within the factual matrix of the bargaining process." *Id.*, at 2326. On a record evidently sim-

ilar to that at bar, the Fifth Circuit enforced the bargaining order based on an overall bad faith conclusion reached by the Board.

CONCLUSION

For the above reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1291

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3–A11) is not yet officially reported. The decision and order of the National Labor Relations Board (Pet. App. A17–A133) are reported at 178 NLRB No. 8.

JURISDICTION

The Company's petitions for rehearing and rehearing *en banc* were denied on December 28, 1970, and the judgment of the court of appeals was entered on the same date (Pet. App. A12–A15, A16). The peti-

tion for a writ of certiorari was filed on February 1, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly concluded that the employer engaged in bargaining negotiations with a fixed determination to avoid reaching an agreement with the union, and thereby violated Section 8(a)(5) of the National Labor Relations Act.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*), are set forth at Pet. App. A1–A2.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. BACKGROUND: THE COMPANY'S OPPOSITION TO THE UNION

Kellwood Company operates more than 30 seperate plants throughout the United States. Kellwood's Ottenheimer Division, which manufacturers women's apparel, consists of three plants and a distribution center in Little Rock, Arkansas, employing approximately 1,250 employees, and a plant in Lonoke, Arkansas, about 25 miles from Little Rock, which employs approximately 325 employees. (Pet. App. A21.)

In mid-August 1965, the International Ladies' Garment Workers' Union, AFL–CIO (the "Union") began a drive to organize the employees at the Ottenheimer Division's Little Rock plants (Pet. App. A22).

Kellwood countered with a massive anti-union campaign, which the Board found to be highly coercive and violative of Section 8(a)(1) of the Act (Pet. App. A10, A25–A37, A91–A93). As the Trial Examiner, whose findings were adopted by the Board, stated: "Respondent, in all of this, was seeking to show the employees the utter futility of their joining, supporting, and voting for the Union; was seeking to convince the employees that Respondent did not want the Union and had no intent to sign a contract with the Union; that the Respondent would not agree to the Union's demands and that a strike was inevitable, and that an inevitable result of such strike would be the loss of their jobs by the employees" (Pet. App. A37).

Notwithstanding this anti-union effort, the Union won a representation election conducted by the Board on January 12, 1966, by a vote of 666–564. On March 3, 1966, after the Company's election objections were overruled, the Union was certified as bargaining agent for all production, maintenance, and shipping employees in the Ottenheimer Division's Little Rock operations. (Pet. App. A25.)

2. NEGOTIATIONS: MARCH 23–JULY 19, 1966

Collective bargaining negotiations between the Union and the Company began on March 23. During the ensuing four months there were about 20 meetings between the parties (Pet. App. A43–A44). Although both sides knew the economic issues were the crucial ones, the Company insisted on discussing non-

economic subjects first, and accordingly the parties did so "almost to the point of exhaustion" (Pet. App. A45).

In early April, the Union presented a proposal that the Company raise its minimum wage from $1.25 per hour, the then legally mandated minimum, to $1.50 per hour (Pet. App. A44–A45; Pet. 5, n. 2). Not until the last week in June, over two months later, did the Company come forward with a counterproposal on this critical matter (Pet. App. A48). It offered an immediate 5-cent increase above the current federal minimum wage, and then additional increases to keep up with the anticipated increases in the federal minimum (Pet. App. A48–A49, A60).[1]

About a week prior to a bargaining session scheduled for July 18, Kellwood's division heads assembled for a meeting called by Kellwood President Wenzel. At this meeting it was decided to announce on July 18 a 10-cent hourly increase in wages, effective August 1, at all Kellwood plants except the plants in Little Rock represented by the Union (Pet. App. A51–A52). As to the latter, Wenzel and Guthunz, who headed the Ottenheimer Division, determined that the Company

[1] The new law, which was enacted the following September, raised the federal minimum to $1.40 per hour as of February 1, 1967, and to $1.60 per hour as of February 1, 1968 (Pet. App. A60). As petitioner describes its proposal (Pet. 5, n. 2), the Company's minimum would have gone to $1.30 as of the effective date of the contract, to $1.40 on February 1, 1967, to $1.45 on August 1, 1967, to $1.60 on February 1, 1968, and to $1.65 on August 16, 1968. Thus, for two six-month periods during the three-year contract term, the Company's minimum would not have been above the federal minimum.

would make the same 10-cent offer to the Union in the July 18 Little Rock negotiations (Pet. App. A52). Company officials later acknowledged "that one of the reasons for granting the raise was to demonstrate to the employees that they could get a raise or benefits without a union" (Pet. App. A53). Moreover, as the Trial Examiner found, "one of the reasons Respondent timed the announcement for July 18 instead of, say July 19, was to maximize its adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations" (Pet. App. A53).

On July 18, as planned, the Company announced the 10-cent increase at its plants throughout the country. At the Lonoke plant, which was part of the Ottenheimer Division and located only 25 miles from Little Rock (*supra*, p. 2), a Company official emphasized to the employees:

> You did not have to pay one cent in union dues to get this increase. It was not necessary for you to call on any union outsiders to speak in your behalf in order to get this raise.
>
> * * * This increase should be proof that a union is not needed by a company like ours that treats its employees fairly and rewards them for their good work. [Pet. App. A49–A50.] [3]

[3] Petitioner asserts that "the Company-wide wage increase granted at that plant [Lonoke], although a point stressed by both the Board and the court below * * * is one which has already been held *not* to be a violation of the Act by two Courts of Appeal. *Kellwood Co., Ottenheimer Bros. Mfg. Div.* v. *N.L.R.B.*, 411 F. 2d 493 (C.A. 8); *Southern Foundation* v. *N.L.R.B.*, 406 F. 2d 1063 (C.A. 6)." (Pet. 12, n. 9.) In the former, the Eighth Circuit agreed with the Board that the Company

At the July 18 Little Rock meeting, Company representatives discussed other topics for 20 minutes before informing the Union of the decision to put into effect a 10-cent increase in all plants as of August 1 and to offer the same increase to the Union (Pet. App. A50–A51). Shortly thereafter, the Union negotiators received a telephone call from a Union representative, advising of the Company's announcement at Lonoke (Pet. App. A51). The Union negotiators thereupon accused the Company of bad faith bargaining, and the session ended on "this very unfriendly note" (Pet. App. A51).

3. NEGOTIATIONS: AUGUST 18–OCTOBER 24, 1966

On August 18, the Union's chief negotiator, Siems, telephoned a Company official to make a new wage proposal, which included an initial increase of 20 cents per hour (Pet. App. A58). At a meeting on August 29, Siems lowered his proposal to a non-retroactive first increase of 15 cents. The Company held firm to its offer of 10 cents, and indicated that it wanted to put that increase into effect on September 30, retroactive to August 1. The Union refused. (Pet. App. A58–A59.) The parties agreed, however, to a "summit" meeting between Kellwood President Wenzel and Union President Stulberg, neither of whom had previ-

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violated Section 8(a)(1) of the Act based on "the timing, the content and the manner of the [Lonoke] wage increase announcement * * *." 411 F. 2d at 497. The Sixth Circuit case involved not the Lonoke plant but the Company's Alamo, Tennessee plant, and factual distinctions existed between the two cases. *Ibid.*

ously sat in on the negotiations, to be held on September 22 at the Company's offices in St. Louis (Pet. App. A59).

On September 22, the parties went through the list of unresolved issues and succeeded in removing several of them as obstacles to reaching an agreement (Pet. App. A59–A60). Serious disagreement continued on the number of holidays and vacations, the timing for introduction of health and welfare and pension plans, and such economic issues as wage scales and cost of living adjustments (Pet. App. A59–A60). On arbitration of grievances, a major problem, the Company offered a compromise: a "gentleman's agreement" whereby Ottenheimer Division President Guthunz promised to arbitrate matters other than disputes about piece rates whenever requested by Siems, the Union's chief local representative, if Siems would likewise honor Guthunz' requests for arbitration. However, Guthunz refused to put this agreement in writing (Pet. App. A63), and, in a later bargaining session, he cancelled it on the ground that it had been "reached on certain assumptions which * * * no longer have any validity" (Pet. App. A101).

Union President Stulberg made a new Union wage proposal for increases of "10, 10 and 10" (Pet. App. A60). Neither at this meeting, nor afterward, did the Company's negotiators ask Stulberg to spell out the details regarding his proposed 10-cent increments (Pet. App. A61). Stulberg testified that he meant 10 cents above the federal minimum, which would require the Company immediately to boost its minimum

wage by 10 cents to $1.35, then to $1.50 on February 1, 1967, when the federal minimum was scheduled to rise to $1.40, and finally to $1.70 on February 1, 1968, when the federal minimum was scheduled to rise to $1.60 (Pet. App. A60–A61). At the time this proposal was offered both parties had knowledge of these new federal provisions (*id*). Stulberg also asked for a picket line clause—a contractual provision that would allow the Company's employees to respect the picket lines of workers at other Kellwood plants if they engaged in organizational strikes (Pet. App. A62–A63).

On September 29, Stulberg and Wenzel, as well as other members of the negotiating teams, met again, this time at the Union's New York headquarters (Pet. App. A63). A Company representative said that four issues now stood in the way of an agreement: wages, a cost-of-living escalator clause, arbitration of piece rates, and the picket line clause. He said the Company would accept Stulberg's "10, 10 and 10" wage offer if the Union would give way on the other three points (Pet. App. A63). After a Union caucus, Stulberg counterproposed a two-year agreement (his St. Louis offer had been for a three-year pact) without a picket line clause (Pet. App. A63–A64). After a recess during which the Company's negotiators conferred, a Company representative said to Stulberg "you have a contract"—still without asking about the timing of the increases (Pet. App. A64). Stulberg then explained that, in proposing a two-year contract, he intended to follow the same schedule as in his prior

proposal: a 10-cent increase at the outset, 10 cents on top of the new federal minimum wage in February 1967, and another 10 cents on top of the second increase in the legal minimum a year later (Pet. App. A64). The Company negotiators stated that they had thought Stulberg's "10, 10 and 10" three-year offer meant that the increases would be effective at the outset and then on the two succeeding anniversary years of the contract, and that, accordingly, the two-year proposal likewise was tied to the contract anniversary dates, rather than to the effective dates of the federal minimum wage (Pet. App. A61, A64).[3] Thus, under the Company's purported understanding, the last increase would go into effect on the contract expiration date; moreover, under the Company's view the Union was proposing a minimum wage that would be less than the prevailing federal minimum for substantial periods during the contract term (*id*).

The September 29 meeting ended with Kellwood President Wenzel promising to take the Stulberg two-year proposal, as explained that day, to Kellwood's executive committee for instructions, and to let the Union know the Company's position shortly (Pet. App. A65–A66). But, at their hotel after the meeting, Wenzel told his colleagues that he already had sufficient instructions and would not go to his execu-

[3] The Trial Examiner, whose finding was accepted by the Board, concluded that the Company's "alleged misunderstanding of Stulberg's proposal was a bad-faith misunderstanding, contrived and thereafter used as a device to foul up and obstruct the bargaining process" (Pet. App. A62).

tive committee (Pet. App. A66).[4] The Company negotiators then decided to make the "outside" offer that had been part of their bargaining guidelines since the previous May: a 3-year contract, providing for 5 cents above the federal minimum for two six-month periods and 10 cents above that minimum for the remainder of the term (Pet. App. A66, A68). However, no member of the Company negotiating team suggested immediately presenting this new offer to the Union, although the meeting had just ended and both the Union negotiators and the employee committee members were presumably still available (Pet. App. A66–A67).

On October 6, Guthunz presented the Company's "final offer" to the Union's two chief negotiators. The latter asked a number of questions to test the Company's flexibility, and Guthunz responded that "not legalistically, but realistically, it was the Company's final offer," although the Company was willing to continue to bargain and would consider a 30-month contract (Pet. App. A68–A69). The Union representatives indicated they wished to consult President Stulberg and the full negotiating committee (Pet. App. A69).

On October 10, the Union rejected the Company's offer, stating that it was "not enough" (Pet. App. A69). Chief Union negotiator Siems suggested to Guthunz that the parties go "back to the bargaining table" (Pet. App. A69). A bargaining session was ultimately scheduled for October 24, and, in prepara-

[4] As the Trial Examiner stated, "[i]t thus appears that Wenzel indulged in a deceit with the Union on this matter" (Pet. App. A66).

tion therefor, the Union scheduled a meeting of the employees for the night of October 18 (Pet. App. A70).

On October 18, just prior to the Union's meeting, the Company sent the employees a letter outlining the favorable features of the Company's proposal, which it said had been made to "protect you from any possibility of a strike." The letter further pointed out that the Union had not given employees the details of this proposal, and urged them to "INSIST ON YOUR DEMOCRATIC RIGHT TO VOTE" so that a "minority" would not decide the Union's course on whether to accept the offer (Pet. App. A70–A73). In a postscript, Guthunz, who had signed the letter, said the proposal would be presented again on October 24, and that the Company would make the first wage increase retroactive to August 1 only if the offer were accepted by October 28 (Pet. App. A71–A72). The employees attending the Union meeting unanimously passed a resolution authorizing its negotiating committee to call a strike "because of the unfair labor practices of Ottenheimer Brothers * * *" (Pet. App. A73–A74).

The October 24 bargaining session was marked by bitter exchanges on both sides and ended when the Company's negotiating team walked out (Pet. App. A74–A75). As the Trial Examiner found (Pet. App. A77.):

> At this meeting, Respondent's spokesman [Kullman] conducted himself more as though he was intentionally trying to aggravate the

> situation and force the employees to strike than as though he were trying to move forward to an accord with the Union. Thus, instead of moving forward Kullman went backwards, and, using figures he knew were erroneous, talked about the "agreement" in New York and called the Union's negotiator a liar. Kullman also accused the Union of deceiving employees as to what happened in New York. * * *

On the afternoon of October 24, the Company sent another letter to the employees, which attacked the Union and announced that the Company would increase wages by 10 cents per hour immediately because the Union had "forced this impasse" (Pet. App. A77–A79). The Company did not send a copy of this letter to the Union or otherwise notify it that it was going to put the 10-cent increase into effect (Pet. App. A79).[4] The letter also accused the Union's chief negotiator of denying the true facts about the New York meeting, erroneously claimed that the Union had said in the meeting of October 24 that it had no offer on the table, and urged employees not to be "misled" by a union that wanted to "force" them out on strike "to further *its interests*" (Pet. App. A78–A80).

4. THE COMPANY'S CONDUCT DURING THE STRIKE

The strike began on October 25 and lasted for 13 months, until the Union abandoned it (Pet. App. A80). During this period there were several meetings and various exchanges of correspondence between the

[4] The Board found that this unilateral increase, which was actually instituted on October 25, constituted a separate violation of Section 8(a)(5) and (1) of the Act (Pet. App. A126).

parties, but no progress was made towards resolving the dispute (Pet. App. A98–A114). On the contrary, the Company aggravated the situation. Thus, as the Trial Examiner found, its attitude and conduct at meetings on May 15 and July 21, 1967, evinced "no genuine effort to reconcile its differences with the Union," but instead were "designed to frustrate rather than promote an agreement" (Pet. App. A112–A114). Moreover, the Company committed additional unfair labor practices. On December 21, 1966, it refused to give the Union relevant information—a current list of employees on the payroll—needed for bargaining purposes (Pet. App. A106–A109); on February 1, 1967, it instituted a second unilateral wage increase over the Union's objection (Pet. App. A109–A111); it bargained directly with strikers concerning their return to work during and after the strike (Pet. App. A111, A120); and, on December 5, 1967, it withdrew recognition from the Union (Pet. App. A121).

In reviewing the Company's situation on December 22, 1967, a month after the conclusion of the strike, Ottenheimer Division President Guthunz told the employees, most of whom were replacements hired during the strike, that the Company "did what we set out to do—we did what we promised to do—which is more than I can say for another group" and that the unfair labor practice charges recently filed by the Union represented the "union's last gasp" (Pet. App. A40).

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board, affirming the Trial Examiner, found, *inter alia*, that "the preponderance of the evidence in the entire record" demonstrates that the Company "never intended to reach a contract with the Union * * * [and] that no good-faith impasse was ever reached" (Pet. App. A88, A17). Accordingly, the Board concluded that the Company "[a]t all times since March 23, 1966 * * * has violated Section 8(a)(5) and (1) of the Act by refusing and failing to bargain in good faith with the Union * * *" (Pet. App. A125). The Board ordered the Company, *inter alia*, to cease and desist from the unfair labor practices found, to bargain with the Union in good faith, and to embody any understanding reached in a signed agreement (Pet. App. A127-A130, A18).[8]

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order except in one respect not here pertinent (Pet. App.

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[8] The Board also found that the Company further violated Section 8(a)(1) and (5) of the Act as noted *supra*, pp. 12, n. 5, 13. Moreover, it found that the strike was caused and prolonged by the Company's unfair labor practices, and that the Company thus violated Section 8(a)(3) and (1) by failing and refusing to reinstate the strikers upon the termination of the strike and the Union's unconditional reinstatement application on their behalf (Pet. App. A126). To remedy this violation, the Company was ordered to offer reinstatement to the strikers (discharging if necessary employees hired since the commencement of the strike), and to make each striker whole for any loss of pay he may have suffered because of the discrimination (Pet. App. A129).

A3–A11). The court concluded "[w]e have little difficulty with this record in holding that there exists sufficient evidence to sustain the Board's finding of Section 8(a)(5) bad faith" (Pet. App. A8–A9). The court pointed to the undisputed evidence "that the company in its pre-election campaign and in its later bulletins and speeches emphasized that they could not be forced to agree with the union and that they later boasted they were successful in keeping their promises" (Pet. App. A8–A9). It added: "The company's early shadow bargaining, evidenced by offers which gave no more than the anticipated federal minimum wage increases, cannot be ignored; the unilateral wage increases immediately before and during the strike, their earlier misrepresentation that they would have to confer with Kellwood's Executive Committee before negotiating further, the company's ploy in rehashing old misunderstandings in post-strike meetings, the company's denial of relevant information requested by the union in bargaining, all are among the many many incidents considered by the Board supporting an 8(a)(5) violation" (Pet. App. A9).

ARGUMENT

The basic issue raised by the petition is whether an overall refusal to bargain in good faith may be found despite the employer's desire to reach an agreement, primarily because he has manifested an anti-union attitude and has taken a bargaining stance which may "embarrass" or "denigrate" the union (Pet. 2, 8–9). However, this issue is not presented by this case. The Board found that petitioner engaged in

bargaining with no intent to reach a final agreement with the Union (Pet. App. A84, A89), and that this intention was manifested, not only by its anti-union attitude and the quality of its bargaining proposals, but by such other acts as announcing a 10-cent wage increase at the nearby Lonoke plant before making the same offer to the Union at Little Rock; communicating directly with the employees in October in an effort to undermine the Union's position at the bargaining table; granting unilateral wage increases both immediately before and during the strike; Kellwood President Wenzel's deceit in informing the Union that he had to take Stulberg's last proposal back to the Kellwood executive committee; and the Company's "bad faith misunderstanding" of Stulberg's wage proposals (Pet. App. A82–A90).

The court of appeals had "little difficulty in holding that there exists sufficient evidence to sustain the Board's findings of §8(a)(5) bad faith" (Pet. App. A9). It added: "It is difficult in judicial hindsight to avoid any conclusion other than the one reached by the Board. There existed obvious strategy to force a 'collision course' and obstruct bargaining. The company succeeded in what it set out to do." (Pet. App. A11).[1]

[1] Contrary to petitioner's suggestion (Pet. 2, 10), the court below did not disagree with the Board by finding that the Company's misunderstanding of Stulberg's "10-10-10" proposal was in good faith (see Pet. App. A82). The court merely stated: "Assuming, solely for the sake of argument, there existed a good faith misunderstanding in the 'acceptance' of the company, there are too many other factors which weigh against the company's contention of good faith bargaining" (Pet. App. A6).

These factual issues present nothing warranting further review. See *National Labor Relations Board* v. *American National Insurance Co.*, 343 U.S. 395, 420; *National Labor Relations Board* v. *Truitt Mfg. Co.*, 351 U.S. 149, 155 (Mr. Justice Frankfurter concurring).[1]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1971.

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[1] The cases cited by the Company—*M.R. & R. Trucking Co.* v. *National Labor Relations Board*, 73 LRRM 2705 (C.A. 5) (Pet. App. A134–A138), and *United Steelworkers of America* v. *National Labor Relations Board* (*Florida Machine & Foundry Co.*), 73 LRRM 2790 (C.A. D.C.) (Pet. App. A148–A161)— are factually distinguishable. Cf. *Sweeney & Co.* v. *National Labor Relations Board*, 76 LRRM 2821, 2826 (C.A. 5).

Supreme Court, U.S.
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MAR 15 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1891

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1251.

KELLWOOD COMPANY, OTTENHEIMER DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL LADIES' GARMENT WORKERS UNION, AFL-CIO,
Respondents.

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Board's brief in opposition (p. 15) correctly observes that the "basic issue raised by the petition is whether an overall refusal to bargain in good faith may be found despite the employer's desire to reach an agreement, primarily because he has manifested an anti-union attitude and has taken a bargaining stance which may 'embarrass' or 'denigrate' the union." Both the Board and Union briefs in opposition argue, however, that this case is not an appropriate vehicle to present this question. They demonstrate precisely the opposite. The present case, as the briefs themselves make apparent, raises in clear focus the critical issue of whether the Board may utilize negotiating attitudes and stances *as the sole basis* for finding a refusal to bargain in good faith.

1. The Board argues that, apart from Kellwood's "attitude and the quality of its bargaining proposals", there were "other acts" which manifested its intent not to reach a final agreement. Bd. Br., pp. 15-16. This contention misconstrues the basis for the decision below. The Court of Appeals did not consider such "other acts" in the context of a desire, or lack of desire, to reach agreement. The presence or absence of such intent was immaterial to the court. Instead, the court's singular concern with such "other acts" was as "evidence" of a design "to embarrass and undermine the union" and "denigrate the union in the eyes of its members". Appendix B-1, pp. A7-A9.

Kellwood's negotiating attitudes and stances formed the very core of the court's decision. They are also the crux of the briefs in opposition. For example, both briefs (Bd. Br., pp. 4-5, 16; U. Br., pp. 4-5) condemn the timing of the announcement of a wage increase at the Company's unrepresented plants on the ground that it was "designed to maximize its adverse effect upon the Union's bargaining power and bargaining position in the Little Rock negotiations." However, even assuming such a motive, does good faith bargaining preclude employer action designed to minimize union bargaining power? Does good faith bargaining require that employer conduct at unrepresented plants enhance, rather than detract from, a union's bargaining position? Similarly, may not an employer engage in non-coercive communications to its employees during negotiations even though the effect may be to "undermine the Union's position at the bargaining table" (Bd. Br., pp. 11-12, 16; U. Br., p. 5)? Is it a "deceit", and bargaining in bad faith, for a company negotiator to fail to "immediately" present a new offer and determine on his own the appropriate timing for a response to a union proposal (Bd. Br., pp. 9-10, 16)?

These are some of the questions central to the decision below. They are questions which, for the reasons set forth in the petition, should be answered by this Court.

2. The briefs in opposition seek to compress this case within the traditional mold of bad faith bargaining, a mold premised entirely upon the absence of any intent to reach final agreement. It surely requires no "stretch of the imagination" (U. Br., pp. 6-8) to ascertain that the decision below is cast in an altogether different mold. The court below expressly *assumed* Kellwood desired to reach final agreement. It *assumed* a "good faith" acceptance of the Union's proposal. Appendix B-1, p. A6. The court simply did not regard the absence of an intent to reach final agreement as the *sine qua non* of a refusal to bargain in good faith.

The court's opinion is predicated entirely on a belief that employer conduct which may "embarrass" or "denigrate" a union is, *standing alone*, sufficient to support a refusal to bargain. This approach posits a novel and dangerous standard of good faith negotiation. It adopts a criterion which, as discussed in the petition (pp. 11-16), has been specifically rejected by the Fifth and District of Columbia Circuits. It establishes a new and uncharted area of governmental interference in the process of collective bargaining which warrants review by this Court.

3. Despite protestations to the contrary, both briefs in opposition repeatedly resort to negotiating attitudes and stances, rather than an absence of any desire to reach agreement, to justify the decision below. For example:

> (a) The Board notes that, "although both sides knew the economic issues were the critical ones, the Company insisted on discussing non-economic subjects first . . ." Bd. Br., pp. 3-4. This bargaining technique, a standard approach of most experienced employer

negotiators,[1] clearly does not demonstrate the absence of any intent to reach final agreement.

(b) The Board criticizes Kellwood's initial wage proposal because, "for two six-month periods during the three-year contract term, the Company's minimum would not have been above the federal minimum." Bd. Br., p. 4, n. 1.[2] The Union suggests a different defect in the Company's wage offers—that while the Company had decided in May that a ten-cent increase was its *outside maximum* (Appendix C-2, p. A66), this amount was not offered to the Union until July. U. Br., pp. 4-5.[3] Again, such an analysis of the amount and timing of bargaining stances is irrelevant to determining whether there exists a desire to reach agreement.

(c) The Board and Union find fault with Kellwood's failure to ask the Union "to spell out the details" of its disputed September 22 wage proposal. The absence of a request for an explanation, and the re-

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1. See "How to Win at the Bargaining Table", Research Institute of America (March 4, 1966), at p. 6, recommending to employer negotiators that they "[p]ostpone wages and other money benefits until other desired changes have been worked out; once it has an agreement on money the union has no motivation to consider a change in the grievance procedure."

2. At one point the Board even suggests that the Company considered the Union to be "proposing a minimum wage that would be *less than* the prevailing federal minimum . . ." Bd. Br., p. 9 (emphasis added). This is clearly preposterous; the Board found only that the Company viewed the Union's proposal as one "which would permit any employee to receive *only* the Federal minimum during two six-month periods of the contract." Appendix B-2, p. A61 (emphasis added). Indeed, the whole wage rate argument is a strawman. The proposed wage rate was only a *minimum* guarantee, rather than the employees' base rate which would have been 27½¢ an hour higher.

3. Cf. "How to Win at the Bargaining Table", *supra* n. 2, at pp. 5-6: "Don't make an offer on wages until the union comes in with a realistic figure. . . . Don't close out an agreement too early. . . . If the situation is heading toward impasse, try to save a little something for the conciliator or mediator to work with."

ultant misunderstanding of the proposal, are accordingly categorized as part of a "contrived . . . device to foul up and obstruct the bargaining process." Bd. Br., pp. 7, 9, n. 3; Union Br., p. 5. This contention is also founded upon a subjective evaluation of negotiating attitudes and stances. It is one which raises a host of controversial problems with which the Board should not be concerned. Thus, should the burden of explanation be one placed on the party receiving, rather than proffering, an offer? And if the Union's failure to make its position clear was found to be a practice "not to be condoned" (Appendix C-2, p. A60), how can the absence of a Company request for clarification then be deemed part of a contrived plot?

(d) Much ado in both briefs (Bd. Br., pp. 11-12; U. Br., pp. 5-6) is made about the Company's assumption that an impasse existed on October 24 although its October 6 retroactivity offer had originally been proposed as open for acceptance until October 28. This argument is one which, once more, presumes that the Board is the regulator of bargaining strategy and approaches. The retroactivity proposal was made to encourage the employees "to vote to accept [the Company's entire] offer and end all this confusion and uncertainty." Appendix C-2, p. A71. No such vote was forthcoming; in fact, at the October 24 bargaining meeting the Union informed the Company that its offer had been voted on twice, twice rejected and a strike vote taken. Appendix C-2, p. 75. The Company was not required to engage in a futile act and leave its proposal open until October 28 anyway because the Union might have changed its mind. The wisdom of negotiation tactics of this nature cannot be the touchstone of a refusal to bargain.

(e) The Union (U. Br., p. 6) deprecates the significant concessions made by the Company during the course of negotiations (Petition, p. 15) asserting that they represented either established Kellwood practices or changes that would also be effectuated at its unrepresented plants. There is no basis in the

record for this bald assertion.[4] Nor is there any ground for contending that such concessions do not evidence a desire to reach agreement if, in fact, such intent is still the standard for a refusal to bargain in good faith.

4. As we noted in the petition (pp. 15-16), this case is illustrative of a new Board approach to collective bargaining. Board Chairman Miller recently made a similar observation in a dissent to an analogous Board decision in *Western and Southern Life Insurance Company*, 188 NLRB No. 76, 76 LRRM 1342 (Feb. 11, 1971). The Chairman, relying as we do on the position of the District of Columbia Circuit in *United Steelworkers of America* v. *N. L. R. B. (Florida Machine & Foundry Co.)*, ... F. 2d ....., 75 LRRM 2790 (Dec. 4, 1970) (See Petition, pp. 11-16), commented in language equally apropos here:

> "The balance of the case presents another one of those instances in which hard bargaining has not produced an agreement, and where the union either does not have, or does not choose to utilize, its economic strength as a means of attempting to secure a contract suitable to it. Instead it filed a charge with this Agency, seeking whatever advantage one of our bargaining orders may give it in its efforts to move the employer to a less obstinate position.
>
> "Passing the question as to whether it is wise for us to serve as a lever in bargaining situations, my view of the record here does not lead me to the conclusion that there was a lack of good faith by respondent, but rather to the conclusion that it was a hard bargainer.

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4. The Board similarly distorts the record in its reference to the Gethuns service award speech on December 22, 1967. Bd. Br., p. 13. This speech was not related in any way to Company's statements during the union organizational campaign more than two years prior. As the speech itself makes clear, the fulfilled "promises" referred to were promises made to employees in 1966 that, despite the strike, Kellwood intended within a short period to rebuild its Little Rock operation "back to where it was before the strike". Appendix C-2, p. A40.

> As the trial examiner saw it, 'respondent made no meaningful concessions.' As the statute and this Board and the courts have made clear, a failure to make concessions (much less 'meaningful' concessions) does not violate our Act. . . ."

For the foregoing reasons, as well as those set forth in the petition, this petition for writ of certiorari should be granted.

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